

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT.

In the
United States Court of Appeals
for the District of Columbia.

No. 9235.

435

THE McCORMICK-MATHERS PUBLISHING COMPANY,
a Corporation, *Appellant*,

vs.

ROBERT E. HANNEGAN, Postmaster General of the United
States, *Appellee*.

*Appeal from the District Court of the United States for
the District of Columbia.*

United States Court of Appeals
for the District of Columbia

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the District of Columbia.*

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment rendered by the District Court of the United States for the District of Columbia wherein appellant's amended petition for injunction was dismissed.

The action was within the general jurisdiction of the court below under the provisions of Sec. 11305-6 and 11-324 of the District of Columbia Code. This appellant

is within the jurisdiction of this Court by reason of the provisions of 17-101 of the District of Columbia Code.

In appellant's amended petition under which the cause was tried it was alleged that the defendant had wrongfully, arbitrarily and in violation of the law denied unto the plaintiff the right and privilege of having certain books carried through the United States mail at the book postage rate fixed by the Act of the 77th Congress of the United States approved June 30, 1942 (39 U. S. C. A., Sec. 293a).

Appellant prayed that appellee be required to obey said Act of Congress and to extend unto it the rights and privileges granted thereunder and that appellee be permanently enjoined from, in any manner, causing appellant's books to be excluded from the mails at the postage rate fixed by said Act, and be ordered, directed and required to transmit the books described in its petition at the postage rate fixed thereby (App. pp. 2-12). The cause was tried under appellant's amended petition and appellee's answer thereto (App. pp. 23-26) and thereafter the court entered a judgment dismissing appellant's petition (App. pp. 32-33).

STATEMENT OF THE CASE.

The cause was submitted for final determination under an agreed statement of fact (App. pp. 27-32).

Appellant is a Kansas corporation, having its office and principal place of business at Wichita, Kansas, and maintaining branch offices at Columbia, Ohio, and Atlanta, Georgia.

Appellant is engaged in the publication, sale and distribution of school textbooks commonly referred to as "work books." The books described in appellant's petition and involved in this case were offered in evidence as Exhibits 1, 2, 3, 4, 5 and 6, and were described in paragraph VI of the amended petition as numbers 1, 2, 3, 4, 5 and 6.

Other books were referred to in the amended petition but it was stipulated by the parties prior to the trial that the issue as to whether or not the books described in paragraph VI of appellant's amended petition were entitled to be carried through the mail at the book postage rate should be restricted to the first six books described in said paragraph.

The Act of Congress, under which it is contended that appellant is entitled to have its said books described in the amended petition (and which are before this Court under agreement of the parties), was approved June 30, 1942, and is entitled "An Act To Provide For A Permanent Postage Rate Of Three Cents A Pound On Books" (56 Stat. 462, 394 S. C. A., Sec. 293a-1). Said statute is in words and figures as follows:

"The postage rate on books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations and containing

no advertising matter other than incidental announcements of books, when mailed under such regulations as the Postmaster General may prescribe, shall be 3 cents per pound or fraction thereof, irrespective of the postal zone or destination thereon; PROVIDED, THAT this Act shall not effect the rates of postage on books mailed by or to libraries and organizations as prescribed by the Act of February 28, 1925, as amended."

Thereafter under Section 403 of the Act of February 25, 1944 (C 63, Title IV, 58 Stat. 69), it was provided that the postage rate on all mail matter of the fourth class should be temporarily increased by an amount equal to three percentum of the rate provided by existing law. It is the contention of the appellant that under the pleadings and evidence in the court below it is entitled to have its books carried through the United States mails at the rate of .03 per lb. plus 3% by virtue of the preceding statutes and that the action of the Postmaster General in denying unto appellant such right and privilege was and is arbitrary, unlawful and a denial of the right given appellant by statute.

It was further contended below that appellee was extending the book postage rate as provided by law to competitors of appellant, denying appellant benefit thereof and requiring it to pay the higher parcel post rate on its books and that such action constituted an unlawful discrimination.

The evidence disclosed that at the time the Act of June 30, 1942, was adopted there was in force and effect a postal regulation promulgated October 31, 1938, by the Postmaster General wherein the meaning of the word "book" was defined as follows:

“A book within the contemplation of this section shall be a cloth or paper-bound volume having 24 or more pages, of which at least 22 are printed, and shall not contain ruled or blank pages intended for records or memoranda purposes.”

The Post Office Department had ruled prior to the adoption of the Act of June 30, 1942, that books containing blank spaces for students' notations were not entitled to the benefit of the then existing book postage rate under presidential proclamation. Immediately after the approval of the Act of June 30, 1942, the Postmaster General amended the Postal Laws and Regulations by promulgation of a new regulation which was in the following language:

“A book within the contemplation of paragraph 5 shall be a cloth or paper-bound volume having 24 or more pages, of which at least 22 are printed, and with the exception of textbooks containing incidental spaces for students' notations shall not contain ruled or blank spaces intended for records or memoranda purposes.” (Para. 6, Sec. 572, Postal Laws and Regulations.)

After the passage of the Act of June 30, 1942, and up to March 30, 1944, appellant was accorded the right and privilege of having the books involved in this cause carried through the United States mail at the book rate of three cents per pound as fixed by said Act (App. 15, 37, 48). On or about the 30th day of March, 1944, the predecessor of the appellee herein, acting through the third Postmaster General, and without notice or hearing, notified the postmaster at Columbus, Ohio, not to accord the book postage rates to appellant's publications entitled “Essentials in English, Laboratory Method—Textbook 3,” “In-

dividual Corrective Exercises for Elementary School English—Book 6” and “Essentials in English, Laboratory Method—Book 3,” said books being identical with or substantially the same as books involved in this action (App. p. 82).

In paragraph 15 of appellee’s answer it was admitted that he would, unless enjoined by the court, continue to refuse to accept and transmit in the United States mails at the “book rate,” accorded by the Act of June 30, 1942, *supra*, the publications of appellant mentioned in paragraph VI of the amended petition for injunction (App. p. 26).

On October 9, 1944, the Post Office Department through the Postmaster General amended paragraph 6 of Sec. 572 of the Postal Laws and Regulations wherein the term “book” was defined to read as follows:

“A book within the contemplation of paragraph 5 shall be a volume permanently bound in cloth or paper having 24 or more pages of which at least 22 are printed, and with the exception of textbooks containing incidental spaces for students’ notations shall not contain ruled or blank pages intended for records or memoranda purposes.”

In the answer filed by the appellee to appellant’s amended petition it was contended that plaintiff’s books were not “books” within the meaning of the Act of June 30, 1942, or under the amended Postal Regulation last above mentioned.

The books involved in this proceeding consist wholly of reading matter with incidental blank spaces for students’ notations, contain no advertising matter other than incidental announcements of books and all of the same are paper bound volumes having 24 or more pages of which at least 22 are printed. Said books are printed, sold and

distributed in final and complete form for students' use in schools of learning and education and are school textbooks commonly known and described as "work books" (App. pp. 14, 35, 36, 38, 39, 40, 53, 55, 56, 59, 60, 61). All of the pages in some of the volumes involved are perforated and a portion of the pages in other of the volumes are perforated. Appellee's contention that the books here involved were not "books" within the meaning of the law was based upon the fact that all or a portion of the pages of the same were perforated for the apparent reason of facilitating the removal of said pages from the bound volume.

In his answer to the appellant's amended petition appellee attempted to justify his action in excluding appellant's books from the mails at the book rate on the ground that the same were not volumes permanently bound and that he had determined that the publications referred to in appellant's amended petition for injunction were not "books" within the meaning of the Act of June 30, 1942, and not entitled to be mailed at the rate prescribed in said Act as amended, and that same were subject to the higher parcel post rates.

Prior to the passage of the Act of June 30, 1942, the Department had ruled that the new postage rate on books, fixed by presidential proclamation on October 31, 1938, did not apply to "work books" having blank spaces for written answers or other hand work and that it was applicable only to volumes consisting wholly of reading matter (p. 9, Ex. 7). Prior to the passage of the Act of June 30, 1942, extensive hearings were held before the House Committee on Post Offices and Post Roads. Some of the books here involved and others of similar type were before the committee (App. pp. 49-51), and it was the declared purpose of the addition of the phrase "or

reading matter with incidental blank spaces for students' notations" to the bill as originally offered to extend the benefit of the book rate to "work books." The evidence in the case disclosed that all of the volumes involved in this proceeding were "work books" and that it was a common characteristic of a "work book" to contain blank spaces for students' notations and to have all or a portion of the pages perforated as are the books of the appellant in this cause (App. 35-40, 53-61).

Mr. Nelson B. Wentzell, Deputy Third Postmaster General and former Superintendent of Division of Classification, testified the publications were not entitled to the special book rate because they had perforated pages and it was regarded by the Department that one of the essential characteristics of a book was that it should be a permanent publication (App. 62). Mr. Wentzell regarded the binding of the books involved as permanent and stated that the binding complied with the regulations (App. 67). He admitted that if the books did not contain perforated pages they would be entitled to be carried at the book rate (App. 66).

The evidence disclosed that appellee and his predecessor, while denying the right of the book rate to appellant, had permitted competitors of appellant consisting of publishers of both "work books" and conventional type textbooks to have their books carried through the mail at the book rate (App. 13-19). It was agreed that appellant would be damaged in a sum in excess of \$3,000.00 by the refusal of appellee to accept at the book rate the publications involved (App. 31).

The evidence disclosed that appellant had no adequate means of distributing its publications except through the United States mails and that it would suffer irreparable damage and injury if denied the privilege of the use of the mails at the book rate and that it had no adequate remedy at law (App. 13-18, 34-37).

STATEMENT OF POINTS.

1. The court erred in dismissing appellant's petition.
2. Under the law and the evidence appellant was entitled to the relief prayed for in its petition for injunction and the court erred in failing and refusing to grant appellant such relief and in ordering appellant's suit dismissed.
3. Under the law and the evidence in the case appellant's Exhibits 1 to 6, inclusive, and described in paragraph VI of appellant's amended petition were books within the meaning of the terms and provisions of the Act approved June 30, 1942, and entitled "An Act To Provide For A Permanent Postage Rate Of Three Cents A Pound on Books" and appellant was and is entitled under said Act to have same carried through the United States mails at said "book postage rate" and appellee's action in denying appellant the benefit of said rate was unlawful and arbitrary.
4. The appellee was not vested with authority by ruling or regulation to determine that appellant's said publications were not books and did not have a lawful right to deny unto appellant the benefit of having said books carried through the United States mails at the rate fixed by said Act of Congress, and the court erred in ruling and holding that appellee was vested with any such right, or the discretion to determine that said books were not books.
5. The action of appellee, without notice to appellant and without hearing, in ruling and holding that appellant's publications were not books within the meaning of

the Act constituted a denial of due process to appellant and it was an unlawful discrimination on the part of appellee to permit appellant's competitors to have their books carried through the mails at the book postage rate and to deny such right to appellant.

6. The Act in question did not give appellee any power or authority to determine by regulation, or within his discretion, that a book was not a book unless permanently bound.

SUMMARY OF ARGUMENT.

I.

The Act of June 30, 1942, provides that postage rates on books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations shall be three cents per pound. It must be assumed that Congress used the word "book" in its usual known, ordinary and plain meaning and with the meaning previously given it by the courts and the Post Office Department itself. The "work books" herein involved are "books" within the meaning of the word "books" as used in the Act.

II.

The legislative history of the Act clearly shows it was the express purpose and intent of Congress that school textbooks known as "work books" should have the benefit of the book postage rate and that same were intended to be included within the meaning of the word "books" as used in the Act.

III.

It was beyond the power of the Postmaster General by regulation, or otherwise, to rule, order or direct that books should not be carried through the mails at the book postage rate unless permanently bound. Conditions were thereby prescribed which the statute does not prescribe.

IV.

For almost two years after the passage of the Act the appellee, or his predecessor, permitted and allowed appellant the privilege of having its books carried through the mails at the book rate. In March, 1944, various postmasters were instructed, without notice to appellant and without giving it an opportunity to be heard, to deny the rate to appellant's books. Such action amounted to an unlawful change of classification and was a denial of due process.

V.

The action of appellee and his predecessor in denying the benefit of the Act to appellant and in extending its benefits to appellant's competitors—the publishers of other school "work books" and of conventional type textbooks—constituted an unlawful discrimination.

ARGUMENT.

It is the contention of the appellant that the District Court erred in dismissing appellant's petition and that under the law and all of the evidence in the case appellant was entitled to the injunctive relief prayed for in its amended petition.

The trial court, disregarding Rule 52 of the Rules of Civil Procedure, entered a final judgment against appellant on the merits without making any findings of fact and separately stating its conclusions of law thereon. The trial court did not decide whether or not the books involved herein are "books" within the meaning of the Act, but in effect sustained appellee's position that said books were not books because appellee had so determined for the reason they were not permanently bound.

The court held that the language of the statute was plain and unambiguous and that if Congress intended anything other than what it categorically stated in the statute it would have said so. The judgment of the District Court was directly contrary to the evidence in the case and the legal conclusions set forth by the court in its memorandum opinion.

The Act in question clearly and unequivocally provides that the postage rate—

“On books consisting wholly of reading matter or reading matter with blank spaces for students' notations shall be 3 cents per pound or fraction thereof, irrespective of the postal zone of destination thereof.”

Congress did not delegate to the Postmaster General the right or power to determine what was or was not a

book or to define the word "book" by regulation. The only regulation authorized by the phrase "when mailed under such regulations as the Postmaster General may prescribe" necessarily was limited to regulations concerning the way and manner of mailing—that is, the nature of the package in which the books must be contained, the maximum weight thereof, the manner of addressing, labeling and affixing of postage. The phrase just quoted certainly did not amount to a delegation to the Postmaster General of the right by regulation to say that a publication could not be a book unless same was permanently bound.

I.

It must be assumed that when Congress used the words "books" in the Act same was used in its usual, known, ordinary and plain meaning. Appellant's publications are books.

In the case of *United States v. Powell*, 95 Fed. (2d) 752, the Circuit Court of Appeals declared:

"Congress must be presumed to have used the words in their known and ordinary significance. *Old Colony R. Co. v. Commissioner of Internal Revenue*, 284 U. S. 552, 52 Supreme Court 211, 76 Lawyers Ed. 484; *A Magnano Co. v. Hamilton*, 292 U. S. 40, 54 S. Ct. 599, 78 Lawyers Ed. 1109."

In *United States v. Stewart*, 311 U. S. 60, 61 Sup. Ct. 102, the Supreme Court declared (l. c. 102):

"It is likewise true that Congress will be presumed to have used the word in its usual and well settled sense."

The word "book" when it was used in the Act by the Congress had a well-defined meaning. The Post Office

Department many years prior to the enactment of the bill had by regulation defined the meaning of the word "book" as used in the postal laws in the following language:

"A book, within the contemplation of this section, shall be a cloth or paper-bound volume having 24 or more pages, of which at least 22 are printed, and shall not contain ruled or blank spaces intended for records or memoranda purposes."

Mr. Roy M. North, then Deputy Third Postmaster General, gave the same definition of the word in his testimony before the House Committee on Post Offices and Post Roads (p. 11, Ex. 7). It will be noted that in neither Mr. North's definition nor in the definition contained in the postal regulations was there any requirement that a book, to be a book within the meaning of the law, must be permanently bound. Immediately after the passage of the Act in question, and in compliance therewith, the Department's definition of the word "book" was changed by amendment to the Postal Laws and Regulations to conform with the provisions of the Act that its benefits should be extended to books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notation.

The new regulation issued June 30, 1942, was in the following language:

"A book within the contemplation of paragraph 5 shall be a cloth or paper-bound volume having 24 or more pages, of which at least 22 are printed, and with the exception of textbooks containing incidental spaces for students' notations, shall not contain ruled or blank spaces intended for records or memoranda purposes."

In that regulation it was not provided that a volume in order to be a book must be permanently bound.

The regulation indicates that it was the Post Office Department's construction of the Act that permanent binding was not necessary to characterize a printed volume as a book.

The governing factor in this case is the meaning of the word "book" and that meaning depends on the purpose it was used in the statute and the meaning which the Congress gave to the word at the time the bill was enacted.

In the case of *Helvering v. Janney*, 311 U. S. 189, 61 Sup. Ct. 241, the court said (l. c. page 244):

"This, we think, was the meaning of the provision of the Revenue Act of 1934 when it was enacted, and it was subject to change only by Congress, and not by the Department."

In *Taft v. Helvering*, 311 U. S. 195, 61 Sup. Ct. 244, the court said:

"We are of the opinion that under the provision of the Act of 1934, taken with the meaning we think it had when enacted, petitioners were entitled to the combined reductions they claimed, and that the departmental regulation to the contrary was ineffective to deprive them of that right."

In *Helvering v. Hemmel*, 311 U. S. 504, 61 Sup. Ct. 368, the court stated (l. c. p. 369):

"The term sale may have many meanings, depending on the context, see Webster's New International Dictionary. The meaning here depends on the purpose with which it is used in the statute and the legislative history of that use."

In the same case (l. c. p. 371) the court further declared:

"True, courts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results, or would thwart the obvious purpose of the statute. But courts are not free to reject that meaning where no such consequences follow and where, as here, it appears to be consonant with the purposes of the Act as declared by Congress and plainly disclosed by its structure."

In *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 64 Sup. Ct. 1215, the court declared (l. c. p. 1221):

"The natural meaning of words cannot be displaced by reference to difficulties in administration. For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the grant by Congress is to the Administrator to define 'the area of production' beyond the plain geographic implications of that phrase is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least suggest it. After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

The word "book" is an ordinary word and it had been defined by the Post Office Department many years before the statute in question was enacted. It had been used by

the Congress in postal laws enacted many years before and its meaning as used in such Acts had been defined many years before both by this Court and by the Supreme Court of the United States. Never at any time prior to the promulgation of the Post Office Department's amendment to the Postal Laws and Regulations on October 9, 1944, had it ever been declared by the Congress, by the courts or by the Department that in order for a book to be a book it must be permanently bound. Congress when it used the word in the Act of June 30, 1942, must be deemed to have used the word in its plain and ordinary meaning and with the meaning which the courts and the Post Office Department had previously given to it.

In Webster's New International Dictionary the word "book" when used as a noun is defined as follows:

"In general, a written or printed narrative, record, representation, or series of these, designed to perpetrate information or literary art.

A collection of tablets of wood or ivory, of sheets of paper, parchment, or other similar material, plain, written, or printed, strung or bound sheets containing continuous printing or letter. When blank, it is called a blank book. When printed, the term often distinguishes a bound volume, or a volume of some size, from a pamphlet."

The only restriction placed upon the meaning of the word "book" in the Act of June 30, 1942, was that it must consist:

"Wholly of reading matter or reading matter with incidental blank spaces for students' notations and containing no advertising matter other than incidental announcements of books."

The word "book" was used by Congress in the Postal Act of March 3, 1879, as amended by the Act of March 3, 1885 (23 Stat. L. 385, Chap. 342, U. S. Comp. Stat. 1901, p. 2669). In that Act books were classified as mail matter of the third class and periodicals as mail matter of the second class. The postage rate on mail matter of the third class was much higher than the postage rate on periodicals or matter of the second class.

In the case of *Payne v. Houghton*, 22 App. D. C. 234, this Court had occasion to define the word "book" as used in the Act of March 3, 1879. In that case the Riverside Press sought by injunction to have its publications entitled "Riverside Literature Series" received and transmitted through the mail as matter of the second class on the theory that the publications were periodicals. The Postmaster General asserted that the publications were books and not periodicals within the meaning of the Act of March 3, 1879. He further claimed that the publications were textbooks because they consisted largely of reprints of stories and books and works of famous authors. According to the opinion of this Court the publications involved were issued at stated periods, were formed of printed sheets without board, cloth, leather or other substantial binding such as distinguished printed books for preservation from periodical publications. In determining that the publications were books within the meaning of the postal law and not periodicals, this Court said (l. c. p. 246):

"Henry Esmond, when given to the world by the genius of Thackeray in 1852, and whether issued by the publisher in paper covers or with board, cloth, leather or other substantial binding, was a book in every sense of the word. Republished singly at any time since the enactment of the present Postal Law

and mailed, either bound or unbound, it has been, and now is unquestionably subject to postage as matter of the third class.

Does it become less a book when, there being no copyright, it may be republished verbatim under its original title, with the addition of a number of named series consisting of books by other authors, numbered consecutively, and issued at stated periods not less than four times a year?"

"Can the well-known book lose its identity and become completely merged in a periodical publication through the adoption and imprint of these editions?"

"Surely Congress could have contemplated no such possibility when it undertook the complete classification of mail matters, putting books in one class and periodical publications in another."

This Court's opinion in the foregoing case was affirmed by the Supreme Court of the United States in *Houghton v. Payne*, 184 U. S. 88, 24 Sup. Ct. 590. In its opinion in that case the Supreme Court declared:

"Are the publications of the Riverside Literature Series periodicals, and, therefore belonging to the second class of mail matter, and entitled to transmission at the rate of 1 cent a pound, or books, as designated in the third class, and subject to postage at the rate of 1 cent for each two ounces?"

The court determined that the publications, which were small books 4½x7 inches in paper covers and each being complete in itself and entirely disconnected with every other number, were books within the meaning of the language of the Act. The court said (l. c. 24, S. Ct. 592):

"A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essen-

tial), but in the fact that it ordinarily contains a story, essay, or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their character. The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they are so issued in consecutive numbers, no one would imagine for a moment that these publications were periodicals, and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all their other characteristics are those of books rather than those of magazines.

The fact that these publications are not bound when issued, or intended for preservation, is immaterial, since in France and most of the Continental countries nearly all books, even of the most serious and permanent character, are usually issued in paper covers, thus leaving each purchaser to determine for himself whether they are worth a binding of more substantial character, and preservation in his library. It is true that in this subdivision of p. 14 it is said that a periodical must be without such substantial binding as to distinguish printed books for preservation from periodical publications, but it is by no means to be inferred from this that to constitute a book the publication must have a substantial binding."

In the concluding paragraph of the opinion the court said:

“We regard publications of the Riverside Literature Series as too clearly within the denomination of books to justify us in approving a classification of them as periodicals, notwithstanding the length of time such classification obtained, and we are, therefore, of the opinion that the judgment of the Court of Appeals was correct, and it is affirmed.”

The same question was again before this Court in the case of *Hitchcock v. Smith*, 34 App. D. C. 521. In that case the publication involved was the *Tip Top Weekly*. The Postmaster General took the position that the publication was in fact a book and not a periodical and therefore not entitled to second class privileges. The volumes of the *Tip Top Weekly* were 8x11 inches in dimensions, were not substantially bound and each issue contained about 32 pages substantially given over to one complete story, the last few pages being devoted to an announcement of the names of those who had made efforts to increase circulation, commendatory letters and a few questions and answers relating to athletics. The court observed that it had all the external characteristics of a publication entitling it to second class postage. In ruling that the publication was a book and not a periodical, this Court stated:

“The real question in this case is whether the external or internal characteristics of a given publication shall control in determining the classification of that publication for transmission through the mails, whether a novel is entitled to go through the mails as a matter of the second class, because it has been preceded and will be followed by other novels by the same author and relating to the same hero or characters. It is, in effect, contended on behalf of appellee that such was the intent of Congress in defining mailable matter of the second class, but the decision of the Supreme Court of the United States in *Houghton v. Pape*, 194 U. S. 88, 48 L. Ed. 888, 24

S. Ct. Rep. 590, in which said Act of March 3, 1897, was carefully reviewed, we think negatives that condition" (l. c. pp. 531-532).

This Court in its opinion then quoted the definition of a book as set forth in the opinion of the Supreme Court in *Houghton v. Payne* and said (l. c. p. 433):

"If the issues of appellees' publications were reduced in size so as to correspond in that respect with ordinary novels, would anyone contend that they were not books within the meaning of the law?"

"We are not able to distinguish the issues of this publication from the ordinary and everyday understanding of the term 'book'."

The opinion of this Court in that case was affirmed by the Supreme Court in *Smith v. Hitchcock*, 266 U. S. 53, 33 Sup. Ct. p. 6, wherein the court said (l. c. p. 8):

"The word 'book' also, of course, has its ambiguities, and may have different meanings according to the connection in which it is used. For purposes of copyright the common monthly magazines may be books, yet they are not so under the present Sec. 17. As books are not turned into periodicals by number and sequence, the magazines are not brought into the third class by having a considerable number of pages stitched together. Without attempting a definition we may say that generally a printed publication is a book when its contents are complete in themselves, deal with a single subject, betray no need of continuation, and, perhaps, have an appreciable size. There may be exceptions, as there are other instances of books. It hardly would be an exception if, where the object is information and the subject matter is a changing one, a publication periodically issued, giving information for the time, should be held to fall into the second class. From this point of view the Tip

Top Weekly and Work and Win are books. They are large enough to raise no doubt on that score; each volume is complete in itself and betrays no inward need of more, notwithstanding that, as in the highwayman stories of an earlier generation, further adventures to follow are promised at the end.

The decision that these weeklies are books shortens what needs to be said as to the sufficiency of the hearing."

Under the foregoing definitions of the word "book" it is clear that a permanent binding is and was not necessary in order to make a printed volume a book within the meaning of the word as used in the postal laws.

II.

Legislative history of the Act.

In order to determine the meaning in which the word was used by Congress we turn to the legislative history of the Act. That legislative history clearly shows that it was the express purpose and intention of the Congress when it used the word "book" in the Act to include therein "school textbooks" commonly referred to as "work books" and wholly similar in construction and character as the books involved in this action.

The Act as originally introduced and passed in the Senate (Senate Bill 377) did not contain the clause "with incidental blank spaces for students' notations."

Other bills involving the same question were introduced in the House, and extensive hearings were had before the House Committee on The Post Office and Post Roads (Ex. 7). At these hearings it was urged, both by members of the committee and by interested citizens, that Congress should pass an Act which would extend the

benefit of the book postal rate to school textbooks known as "work books" as well as to ordinary textbooks.

A brief review of the history of postal rates on books is helpful and of interest. On October 31, 1938, President Roosevelt by proclamation fixed the postage rate on books and provided in his proclamation that the postage rate on books "consisting wholly of reading matter and containing no advertising matter other than incidental announcements of books" should be 1½ cents a pound or fraction thereof, irrespective of the zone of destination. After this proclamation was issued the Post Office Department extended the benefit thereof to conventional type school textbooks but refused to admit "work books" to the mails at the reduced rate.

In an amendment to the Postal Laws and Regulations adopted October 31, 1938 (Ex. 14), immediately following the presidential proclamation, it was provided that the postage rate on books consisting wholly of reading matter should be 1½ cents per pound.

In instructions issued to postmasters by Ramsey S. Black, Third Assistant Postmaster General, on November 17, 1938 (Ex. 15), it was set forth that the new rate did not apply to "publications such as textbooks having blank spaces for written answers or other handwork." The action of the Post Office Department in refusing to extend the benefits of the reduced postal rate to "work books" was the subject of much discussion in the hearings held by the House Committee. Mr. Roy M. North, Deputy Third Assistant Postmaster General, and Mr. Nelson B. Wentzel, Superintendent, Division of Classification, in the office of the Third Assistant Postmaster General, testified as witnesses before the committee and represented the Post Office Department at the hearings. Mr. North stated that the President's proclamation de-

defined a book as something consisting wholly of reading matter (p. 6, Ex. 7). The presidential proclamation was referred to by Mr. North and placed in evidence (p. 7, Ex. 7). The direction of Mr. Ramsey S. Black, Third Assistant Postmaster General, to postmasters wherein it was provided "publications including textbooks having blank spaces for written answers or other handwork" were not entitled to the benefit of the reduced rate, was also referred to by Mr. North and offered in evidence (p. 9, Ex. 7).

It was called to the attention of the committee that a dispute had arisen between the Post Office Department and publishers as to whether blank spaces contained in work books excluded them from the benefits of the presidential proclamation (p. 21, Ex. 7). At the hearing Congressman Carl T. Curtis made the following statement:

"I want to speak today about one or two classifications, particularly the last one at page 12 of the Senate hearing of June 13, 1941, which says that among publications to which the new rate does not apply are publications such as textbooks having blank spaces for written answers or other handwork. Under the ruling of the Post Office Department such textbooks do not enjoy the benefit of this rate.

"If this government subsidy is justified at all it must be justified on the basis of its cultural and educational contribution. When the Department eliminated textbooks having blank spaces for written answers or other handwork it discriminates against some of the most modern type of textbooks. In other words, the Department is saying that any book, regardless of what tommyrot it may contain, may have this government subsidy, but it chose to make its classification along mechanical lines and say if there is a textbook having blank spaces for written answers or other handwork it may not have

this rate. If one writes on the margin of a book, still that book may qualify for this rate.

"I believe it was the intention of the President when he promulgated this rate to help cultural and educational institutions, and I am here today to urge that the committee make a finding in its report as to what it feels should constitute a book. I think that would be a very proper thing for the committee to do. If something is not done the Department will go on with this practice indefinitely through proclamations, but now the matter is squarely before the Congress. I am satisfied that if the committee does this it will want to include as recipients of this subsidy all publications for public schools, religious schools, and other schools. The two gentlemen who are going to speak next have some of these so-called work books with them. They are a textbook along modern lines. They are streamlined textbooks, and I trust you will take the product of these two gentlemen and pass it around" (pp. 21-22, Ex. 7).

The two gentlemen referred to were Mr. W. P. Johnson, Webster Publishing Company, St. Louis, and Mr. C. E. Holgerson of the plaintiff company, who both testified before the committee (p. 24, p. 31, Ex. 7).

In Congressman Curtis's statement he further said:

"The people are faced by a discrimination that I think we of the Congress should meet" (p. 22, Ex. 7).

He further said:

"I think the Department's ruling constitutes a discrimination, without the Department meaning it to be such" (p. 23, Ex. 7).

Congressman Mike Monroney stated to the committee in reference to the Economy Company, a publisher of Oklahoma City:

"You will see that this publisher uses the combination textbooks and workbooks, and, therefore, under this particular proposal he would be at a disadvantage in competing with the old-line textbooks" (p. 23, Ex. 7).

The proposal referred to by Congressman Monroney was a bill which did not contain a provision including work books. Mr. W. P. Johnson brought work books before the committee, exhibited them, and testified relative thereto. He had before the committee an exercise book for drill work in arithmetic (p. 25, Ex. 7). The book exhibited was doubtless in similar form to "My Arithmetic Tablet No. 3" and "My Arithmetic Tablet No. 7" (Exs. 25 and 26).

At the conclusion of Mr. Johnson's testimony Congressman Flannery observed:

"Since the purpose of this proposal is to promote culture and education, I think these (indicating) books should be included under the favorable postage rate" (p. 27, Ex. 7).

At this hearing Mr. Nelson B. Wentzel, Superintendent of the Division of Classification, contended on behalf of the Department that books having blank spaces to be filled in by the student were not books but were stationery (pp. 28-29, Ex. 7). He had before the committee a work book having perforated pages and blank spaces. We quote Mr. Wentzel:

"Mr. Wentzel: Now, I have here another one called The Preparatory Book to Peter and Peggy.

This is a book in tablet form. It does not have really the binding of a book in the common, ordinary, everyday understanding of the term. *These pages are intended to be torn out.* They are perforated, and the child is supposed to fill them in either by coloring or by writing or drawing" (p. 28, Ex. 7).

Mr. North made the following significant statement before the committee:

"Mr. North: I would like to say, Mr. Chairman, that we attempted to limit the rate to what is generally understood as books, that is, editions of printed matter, with or without illustrations, that are complete within themselves. Now, this work book proposition has been recently put into textbook form, as we see it, and very likely we will have to recognize it under this rate, and the point I made this morning, or attempted to make, was that if the committee wants to say in its report that it is the sense of the committee that some consideration shall be given to the work book, I think it would follow through our own thought in that respect.

"Mr. Flannery: I did not follow that, Mr. North.

"Mr. North: It would follow through our own thought. If the committee should give us the sense of their attitude in their report that consideration should be given to these work books, I think we should, and probably would, draw some line of demarcation, and that it is going to be somewhat difficult and troublesome, of course.

"Mr. Flannery: Perhaps it might be well if the committee would relieve you of that responsibility and just incorporate this phrase in the bill, and that would leave no room for misunderstanding.

"Mr. North: It leaves us more responsibility than otherwise if you tell us to include work books, because who is to define a 'work book'? If you define a work book as one that has 50 per cent blank and 50 per cent printed matter, then there is going to be

a lot of them that will have 55 per cent or 52 per cent blank—and they are worthwhile books, and maybe we should include them. I think a definite description in a bill would be more harmful than helpful, and I am quite sure that we do not want to be arbitrary with it, and have not been.

“Mr. Flannery: You had it 2½ years and ruled against it.

“Mr. North: Well, I think it was reasonable that we did so thus far, because we had all this other blank-book business facing us, and I think the publishers themselves will say—I think Mr. Ernst will testify that we have been very reasonable and considerate thus far in our attitude and construction of what was meant by the President’s proclamation. No; in the future I think we should give very careful consideration to the inclusion of so-called ‘work books.’

“Mr. Flannery: Well, you see, after 2½ years it is rather discouraging to us. It seems to me that the Department has had a fair chance, and they apparently have come to a conclusion adverse to the contention of this gentleman who has that type of books.

“Mr. North: I have attempted to point out that we have not come to that conclusion, but rather to the contrary, we feel that there should be consideration given if we can draw the line somewhere, where it is reasonable, where we will not be thrown into administration that will be expensive and troublesome. I hope I have made myself clear on that line. We do not want to be arbitrary, and we shall not be” (pp. 29 and 30, Ex. 7).

When Mr. Holgerson testified before the committee, he exhibited to the committee and left with the committee for its examination and inspection “work books” either similar to or identical with the “work books” involved in this action. He stated in his testimony:

"May I cite an example by two books that I should like to leave with you? This book is entitled 'Essentials in English Laboratory Method, Book I,' and is used in the freshman year in high school. It is a 192-page book and sells for a net price of 60 cents. This one is Plainway English Exercises, Book III, used in the ninth grade, and sells for 24 cents. Both of them are complete in themselves. Both have been ruled by the Post Office Department as not acceptable under the book-rate classification."

These books had perforated pages and blank spaces for students' notations (p. 9, Ex. 23) (App. 40, 49-51).

Mr. Robert E. Lambert, who was clerk of the Post Office and Post Roads Committee of the House of Representatives at the time the hearings were held, testified books commonly called or referred to as "work books" were produced before and considered by members of the committee (App. 49-51). Two copies of the books published by the plaintiff in this case which were before the committee were obtained from the files of the committee and are in evidence as Exhibits Nos. 36 and 37 (App. 31, 49-51).

Mr. North, sensing that the House Committee desired to extend the benefit of the book postage rate to "work books," suggested that Senate Bill 337 be amended by adding thereto the clause, "consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations." We quote Mr. North's statement:

"Mr. North: Mr. Chairman and members of the committee, I may state again for the record that I have anticipated that we would have to meet the so-called work book proposition, because it is becoming quite popular as a part of the educational system of our country. We would have to meet it administratively and have some reasonable interpretation, I know, but, for the time being, I have thought that

we should obtain the permanent rate before doing anything about that.

"So many are, however, insistent that the Congress define what might be called a work book that if the Congress should make known its attitude, we would have no objection. As I understand, the committee is considering four bills, S. 337, H. R. 4103, H. R. 4382 and H. R. 5265.

"Mr. Burch: Yes.

"Mr. North: H. R. 4382 reads, in part, '* * * consisting wholly of reading matter or reading matter with blank spaces for students' notations * * *.' We suggest that such passage read this way: '* * * consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations * * *.' S. 337 should be amended accordingly. That should apply to both H. R. 4382 and H. R. 5265.

"Mr. Mason: Why the word 'incidental'?

"Mr. North: We feel that blank spaces should not be a major part of the makeup of a book; therefore, we use the adjective 'incidental.' We want something definite but not so restrictive that it will be a disadvantage to both parties, and also difficult of administration.

"In the bill as it passed the Senate, insert after 'reading matter' these words, 'or reading matter with incidental blank spaces for students' notations'" (pp. 46-47, Ex. 7).

Mr. North admitted that any book which was meritorious should have the benefit of the low rate and that work books were meritorious. We quote the following:

"Mr. Mason: Have you gone into how much additional cost it would entail to include these so-called work books that have blanks in them under the rate for printed matter?

"Mr. North: No; it would be very difficult to estimate that.

of the instruction material that goes into the classrooms of America are of the work book variety. *A provision in the present bill includes such books, recognizing them as useful in classroom instruction.*" (Italics ours.)

The committee's report was adopted by the House, and the bill passed as amended. Thereafter, the bill went to joint conference, and the joint conference committee reported that Senate Bill 337 as passed by the Senate be adopted by both Houses if the clause, "reading matter or reading matter with incidental blank spaces for students' notations be included therein" (Ex. 10). In the conference report submitted to the House by its managers there was contained the following statement:

"The House conferees agreed to accept as the basis of the bill the language of the Senate bill to be amended in line 4 by inserting, 'or reading matter with incidental blank spaces for students' notations.' This amendment was insisted upon by the House conferees in order that educational textbooks that have come into common use during the last two decades, commonly referred to as work books, might enjoy the same postage rate privileges as other books." (Ex. 10.)

The report of the joint committee was adopted by both Houses, and the bill as finally passed contained the amendment suggested in the report. It will thus be seen that it was the clear intent and purpose of the Congress of the United States that the book rate should apply to "work books" and that the phrase "or reading matter with incidental blank spaces for students' notations" was inserted in the original Senate bill by amendment for that express purpose.

The evidence in the case disclosed that appellant's publications were "work books" within the well-understood meaning of that term among educators.

III.

The postal regulation of October 9, 1944, requiring permanent binding was and is void and beyond power of appellee.

Evidence was undisputed that more than 25% of the approximately 32 million students enrolled in the public and private schools of the United States below the college level use at least one work book.

Congress having declared that books should be carried through the mails at the rate of 3 cents per lb., it was beyond the power of the Postmaster General or his subordinates, by regulation or otherwise, to declare that appellant's "work books" were not entitled to the benefit of said favorable rate and to refuse to transmit same through the mails at such rate. Congress itself having made the classification, and having declared that a book consisting wholly of printed matter or printed matter with incidental blank spaces for students' notations should be carried through the mails at the rate of 3 cents per pound plus 3%, it was beyond the power of the Postmaster General to make another or different classification or to order and determine that appellants' books could only be carried through the mails at the higher parcel post rate.

Almost exactly the same situation was presented in the case of *Payne v. Railway Publishing Co.*, 20 App. D. C. 581. In that case plaintiff brought mandamus action to require the Postmaster General to admit to and transmit through the mails as second-class matter, under the Act of March 3, 1879, a periodical consisting of a railway

guide which was published monthly. The Postmaster General contended that the guide was mail matter of the third class. He further contended, as is contended by appellee in this case, that he was vested with discretion to determine the postal classification of the publication; that he had acted and that his decision was final. In overruling such contention, this Court declared:

“It is very clear that the Congress of the United States has not committed to the Postmaster General, or to anyone else, the matter of determining what should be carried in the mails as second-class matter, and what as matter of the third class. It has received that power exclusively to itself. It has itself made the classification; and it is not competent for the Postmaster General to add anything to the statute or to take anything from it. It may be that the classification has not been made with all the definiteness that is desirable * * * yet it is not the province of the Postmaster General to remedy the evil, if evil there is, by a postal regulation, or by unwarranted interpretation of the law” (l. c. p. 597).

In the case at bar, the Postmaster General attempts to justify his action by alleging that more than two years subsequent to the passage of the Act he had promulgated a regulation declaring that a book could not be a book unless *permanently* bound (App. 24-25). Such regulation is directly contrary to the meaning of the word “book” as used by the Congress, and an unlawful attempt on the part of the appellee to take something away from the statute and to impose additional requirements beyond those specified in the statute. The regulation prescribes conditions which the statute does not prescribe.

In the case last cited this Court further declared (l. c. p. 598):

“Of course, the Postmaster General and his subordinates are required to use judgment and discretion, and it may sometimes be a matter of much difficulty to identify a publication as one included in the category prescribed by Congress. But their discretion is limited to this question of identification; and it is not competent for them to impose additional requirements beyond those specified in the statute.”

In that case the Post Office Department, after passage of the Act, had promulgated a postal regulation under which it sought to exclude the publication there involved. The court held that the regulation was clearly in excess of the Postmaster General's power because “it prescribes conditions which the statute does not prescribe.” In holding the regulation invalid, the court stated (l. c. p. 600):

“We are clearly of the opinion that the postal regulation of July 17, 1901, as far as it assumes to add to the requirements of the statute in regard to second-class mail matter, is in excess of his authority and of no validity in law.

“Writ granted.”

This case was affirmed on memorandum opinion by the Supreme Court of the United States, 24 Sup. Ct. 849.

In *United States v. Powell*, 95 Fed. (2d) 752, the Circuit Court of Appeals declared:

“Where the provisions of an Act are plain and unambiguous, the governmental department administering the statute has no power to extend or amend it by regulations. The power of an administration officer to prescribe regulations does not carry with it the power to make law.”

The meaning which an Act of Congress has at the time of enactment is subject only to change by Congress and not by regulation of a department or administrative officer. *Helvering v. Janny*, 311 U. S. 189, 61 S. Ct. 241; *Taft v. Helvering*, 311 U. S. 195, 61 S. Ct. 244.

In *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 64 S. Ct. 1215, the Supreme Court, in holding a regulation invalid because beyond the power delegated to the administrative agency by Congress, declared, l. c. p. 1220:

“The determination of the extent of authority given to a delegated agency by Congress is not left for the decisions of him in whom authority is vested.”

Congress did not delegate to the Postmaster General the right to define the word “book” as used in the statute and it must be assumed that the word was used in its usual sense. It was beyond the permissible limits of administrative interpretation for the Postmaster General, by regulation or otherwise, to attempt to restrict the meaning of the word “book” to a permanently bound volume.

In the case of *Social Security Board v. Nierotko*, 66 S. Ct. 637, the court declared (l. c. 643):

“Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. Congress might have declared that ‘back pay’ awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages.

Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function. Congress used a well-understood word—"wages"—to indicate the receipts which were to govern taxes and benefits under the Social Security Act.

"We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation."

Plaintiff's publications being books within the meaning of the word as used by Congress in the Act, it was clearly beyond the power of appellee to declare that they were not books.

The regulation as to permanent binding, being beyond the powers granted by Congress to appellee, was and is void and constituted no defense to appellee's action.

In *United States v. Atlanta Journal Co.*, 210 Fed. 275, the court declared:

"In effect, the regulation restricts the publisher's right under the statute changing to his injury both classification and rate, and this is beyond the authority of the Postmaster General."

In *Bruce v. United States*, 202 Fed. 98, wherein the validity of the regulation of the Post Office Department was involved, the court declared, l. c. p. 103:

"The regulation which plaintiffs in error were charged with violating exceeded the power conferred by the statute upon the Postmaster General and therefore is voided."

Under the theory of appellee of this case, that he could say a book is not a book unless permanently bound, he could go further and say that a book should not be a book unless bound in red leather or blue plastic.

IV.

Action and conduct of appellee and his predecessor constitutes an unlawful discrimination and denial of due process to appellant.

We have heretofore referred to the fact that subsequent to the passage of the Act and prior to March 30, 1944, the benefits of the Act were extended to appellant's "work books." On that date, the Third Assistant Postmaster General, without hearing and without notice to appellant, by letter instructed the postmaster at Columbus, Ohio, where one of appellant's branch offices was located, that appellant's publications were not books and were not acceptable in the mails at the book rate because they contained perforated pages. The letter further stated:

"Even though the pages were not perforated, these publications, the pages of which are to be filled out or worked on by students, may not be regarded as books within the provisions of the paragraphs of Section 572 named above" (referring to the postal regulations) (App. 82).

On and after June 30, 1942, and up to a short time prior to the trial of this cause, the benefits of the book postage rate had been extended to appellant's competitors who sold and distributed work books with perforated pages and having blank spaces for students' notations, and being practically identical in composition with the books here involved. At all times since June 30, 1942, the book postage rate law has been held applicable by the

Department to the publishers of conventional type school textbooks. The testimony was uncontradicted that in the school book business transportation charges are added to the retail price of the book and paid by the consumer. If appellant, by reason of having to pay the higher postage rate, must sell its book at a higher price, then an advantage necessarily accrues to appellant's competitors and a discrimination results. While the Department denied that it knowingly gave other work book publishers the benefit of the law and denied same to the appellant, it is not disputed that appellant actually did lose and its competitors received the benefits thereof.

It was the clear intent and purpose of the Congress to extend the book rate to "work books," as well as conventional type textbooks. The declared purpose of the amendment to Senate Bill 337 was to include "work books" because they were admittedly a valuable tool in the promotion of culture, knowledge and education.

The mere fact there was a possibility after delivery and sale of the book in its finished form the student might, under the instructions of his teacher, remove a portion of the pages therefrom did not destroy its character as a book at the time it was offered for carriage through the mails. A student might buy a conventional type book and thereafter tear all or part of the pages therefrom, still no one could contend that such act would destroy the character of the publication at the time it was being transported through the mails from the publisher to the ultimate consumer. Mr. Wentzel so testified (App. 66-67).

"Work books" and conventional type textbooks are used for the same purpose, namely: education and training. One is as much a book as the other, and the Post Office Department is without authority to say that one is a book, that the other is not; that one can pass through the

mails at 3 cents per pound plus 3%, but the other must pay the higher parcel post rate (which in some instances is from five to ten times the amount of the book rate).

The action of the Postmaster General in attempting to declare that a book is not a book unless it is permanently bound, or because it has perforated pages to permit the removal of those pages if the purchaser desires and elects to do so, amounts to a clear and unlawful discrimination. Such action has been condemned by this Court. In the recent case of *Consumers' Union of United States v. Walker*, 145 Fed. (2d) 333, this Court held that the plaintiff was entitled to an injunction against the Postmaster General and reversed the adverse judgment of the District Court. In the opinion the court declared (l. c. p. 35):

"In the Government's brief, it is urged by way of excuse for no action having been taken against *Fortune Magazine*, the *Reader's Digest*, or the *American Medical Journal*, that this was probably the result of oversight and that no benefit can be claimed in favor of the pamphlet issued by appellant merely because the Postmaster General has neglected to proceed in other cases. This is not a persuasive argument. The other magazines are of wide circulation; two of them with great popular appeal. They would have been called to the attention of the Postmaster General much more quickly than would this little pamphlet issued to a select clientele by the *Consumers Union*. Whether intended or not, the result of the action taken in the present case constituted a clear discrimination against appellant's pamphlet in favor of the others."

In the case of *Esquire, Inc., v. Frank C. Walker, Postmaster General*, 151 Fed. (2d) 49, this Court declared:

"But mail service is not a special privilege. It is a highway which all business must travel. The rates

charged on this highway must not discriminate between competing business of the same kind.

“If the Interstate Commerce Commission were delegated the power to give lower rates to such manufacturers as in its judgment were contributing to the public good, the exercise of that power would be clearly unconstitutional. Such a situation would involve freedom of competitive enterprise.”

The opinion of this Court of the *Esquire* case was affirmed by the Supreme Court of the United States, on certiorari—*Robert E. Hannegan v. Esquire, Inc.*, 66 S. Ct. Rep. 456, 90 L. Ed. Adv. Ops. 429, 14 U. S. Law Week 4129.

In the case of *Public Clearing House v. Coyne*, 194 U. S. 497, 24 S. Ct. 789, 48 L. Ed. 1092, it was declared that even Congress was without power to extend the benefits of the postal service to one class of persons and deny them to another of the same class.

In *Pike v. Walker*, 121 Fed. (2d) 37 (l. c. p. 39), this Court declared:

“Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution, and if they have, it would follow that in administering the laws established to protect the

mail and the regulations thereunder the duty of the Postmaster General would be—to use the language of Justice Brandeis in the *Burleson* case, *supra*,—that:

“ ‘In making the determination he must, like a court or a jury, form a judgment whether certain conditions prescribed by Congress exist, on controverted facts or by applying the law. The function is a strictly judicial one, although exercised in administering an executive office. And it is not a function which either involves or permits the exercise of discretionary power’—which is to say, that his authority is governed by the Acts of Congress which confer it, and by the law of the land.”

We have heretofore referred to a letter of March 30, 1944, addressed by the Third Assistant Postmaster General to the postmaster at Columbus, Ohio (App. 82). That letter referred to a letter under date of February 21, 1944, from the Third Assistant Postmaster General to the postmaster at Atlanta, Ga., a copy of which was sent to the postmaster at Wichita (App. 79). These letters disclose a ruling to the effect that appellant's publications would and should not be admitted to the mails at the book postage rate. The effect of these letters was to bar appellant's publications from the mails at said rate, and to charge the postal classification thereof. These orders were issued without notice to appellant and without giving it any opportunity to be heard. The action of the Post Office Department was in violation of due process.

In the case of *Walker v. Popenoe*, 149 Fed. (2d) 511, this Court declared:

“Appellant's order barring the pamphlet from the mails was issued without notice or hearing. The trial court held, and we agreed, that the order was for that reason a denial of due process.”

In the concurring opinion of Associate Justice Arnold, he said:

“The court below correctly decided that the order barring appellees’ pamphlet from the mails without a hearing was a violation of due process.

“The power to exclude a publication from the mails without a hearing in practical effect permits the Postmaster General to cause irreparable injury to any publisher without the minimum safeguard of an opportunity to present his case. There are, of course, other means of distribution besides the mails, but they are not effective ones in the case of ordinary publications. To deprive a publisher of the use of the mails is like preventing a seller of goods from using the principal highway which connects him with his market. In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be exercised according to the ideas of due process implicit in the Fifth Amendment.”

Conclusion.

It is therefore respectfully urged that the District Court erred in dismissing appellant's petition and in failing and refusing to grant the relief prayed for in the prayer thereof, and that the judgment of the District Court should be reversed and the cause remanded with instructions to the District Court to enter such judgment as will give and preserve unto the appellant the rights given and granted it to have its books carried through the mails at the postage rate fixed by the Act of June 30, 1942, with amendments thereto.

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BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9235

McCORMICK-MATHERS PUBLISHING COMPANY, A CORPORATION,
APPELLANT

vs.

ROBERT E. HANNegan, POSTMASTER GENERAL OF THE UNITED
STATES, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

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*United States Court of Appeals
for the District of Columbia*

DEC 21 1946

Frederick A. Whitman

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ROBERT E. HANNEGAN, POSTMASTER GENERAL OF THE UNITED
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*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

This is an appeal from a judgment dismissing a petition for an injunction to restrain the Postmaster General¹ from refusing to allow transmission of six publications through the mails at a preferential rate allowed by statute to particular types of books.

Appellant is engaged in the publication, sale, and distribution of pamphlets which are used by students and teachers in both public and private schools in the United States. On January 15, 1946, it filed a petition for injunction, seeking to have appellee restrained from refusing to allow its publications to be mailed at a preferential rate provided by Congress for certain types of books. Subsequently, on August 2, 1945, an amended petition for injunction was filed (Jt. App. 2).

¹ The action originally was brought against Frank C. Walker, Postmaster General. By order dated August 6, 1945, the incumbent Postmaster General was substituted as defendant (R. 21).

By its amended petition appellant alleged in substance that under the Act of June 30, 1942, as amended, *infra*, p. 3, it was entitled to mail its publications at the rate of 3¢ per pound, or fraction thereof, plus 3%, and that appellee had refused and would continue to refuse to allow them to be mailed at such rate. It alleged that its workbooks were of the type intended by Congress to have the preferential rate (Par. 8, 9); and that appellee's refusal to allow them to be mailed at such rate was in violation of the statute (Par. 15); that for a time after enactment of the Act of 1942, appellant had been permitted to mail its workbooks at the low rate, but such permission had been withdrawn on or about March 30, 1944, without notice or hearing (Par. 9, 11, 12) and appellant required thereafter to pay the parcel-post rate, which was much greater. Appellant further alleged (Par. 12) that appellee was according to competitors of appellant permission to mail similar books at the low rate. It was asserted that appellee's action amounted to unlawful discrimination and would render appellant unable to compete with publishers of conventional type textbooks and other publishers of workbooks similar to appellant's, who were allowed the low rate (Par. 13). Appellant asserted that irreparable injury and loss would result to it and its customers if the refusal by appellee continued (Par. 14).

Appellee filed an answer to the amended petition (Jt. App. 23) denying that appellant was entitled to mail the publications involved at the book rate prescribed in the Act of June 30, 1942; that appellant had knowingly been accorded the low rate after the passage of the Act and until March 30, 1944; that appellee and his predecessor unlawfully changed the classification of appellant's publications from the book rate to the parcel-post rate; and that appellee had discriminated against appellant by according its competitors the privilege of having publications of the same kind and character as those involved herein carried through the mails at the book rate prescribed by the Act.

It was agreed by the parties that the cause should be submitted to the court below for final determination under a stip-

ulation of facts (Jt. App. 32). It was agreed also that the amended petition should be read to include only the first six publications listed in Paragraph VI of the amended petition (R. 61, Exhibits 1-6). Thereafter, judgment was entered dismissing the amended petition (Jt. App. 33). A memorandum opinion was filed by the Court in which it was stated in effect that the action of appellee in refusing to accord appellant the preferential rate was in the exercise of a reasonable discretion and therefore not subject to interference by the courts (Jt. App. 32).

STATUTES AND REGULATIONS

Applicable statutes and regulations are set forth in the Appendix to this Brief. For convenience the Act of June 30, 1942, is also set forth below:

The Act of June 30, 1942, c. 459 (56 Stat. 462), 39 U. S. C. 293a-1 (1940 ed., Sup. IV):

The postage rate on books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations and containing no advertising matter other than incidental announcements of books, when mailed under such regulations as the Postmaster General may prescribe, shall be 3 cents per pound or fraction thereof, irrespective of the postal zone of destination thereof: *Provided*, That this Act shall not affect the rates of postage on books mailed by or to libraries and organizations as prescribed by the Act of February 28, 1925, as amended.

PRINCIPAL QUESTION PRESENTED

Under the Act of June 30, 1942, providing a preferential postage rate for "books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations," was the Postmaster General justified in determining that appellant's publications, consisting wholly or in part of pages designed for removal, are not entitled to be mailed at the preferred rate?

SUMMARY OF ARGUMENT

I

The Act of June 30, 1942, plainly states that the Postmaster General is vested with discretion to define the term "books" as used in the statute. The contention that the Postmaster General has such discretion is supported also by the legislative history of the statute and by the administrative necessity that there be a central authority to classify mail matter under the Statute.

II

The Postmaster General exercised the authority vested in him in a reasonable manner by defining "books" as publications "permanently bound." This definition coincided with the intention of Congress as indicated by the legislative history. Moreover, it was a reiteration of the position taken by the Postmaster General in classifying books from the time that a preferred book rate was allowed by Executive Order, in 1938, and from an even earlier time.

III

The Postmaster General having defined "books" as publications "permanently bound," the only reasonable determination he could have made with regard to appellant's publications was that they were not "books" within the Statute. The characteristics indicating plainly that all or some of the pages of the pamphlets were designed for removal compelled the determination that they were not permanently bound.

IV

There is no merit to appellant's contention that the classification of its publications was changed in violation of due process. The evidence establishes that appellant's publications were never *allowed* or *permitted* to be mailed at the book rate. The Department consistently took the position that appellant's publications were not books within the Statute.

The evidence likewise fails to support appellant's contention that the Postmaster General discriminated between its publications and similar publications of its competitors.

Since there is a fundamental difference between appellant's publications and so-called "conventional type textbooks," it cannot be said that the Postmaster General unlawfully discriminated by allowing the book rate to such textbooks, while denying it to appellant's publications.

ARGUMENT

I

The Postmaster General is vested with discretion to determine whether publications offered for mailing are books entitled to the special rate prescribed in the Statute

(a) The language of the Statute

Appellant argues (Br. 37) that the postal regulation of October 9, 1944, was beyond the power of the Postmaster General, since the Act of June 30, 1942, did not empower him to define the word "books."

The Act prescribes the postage rate for "books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations and containing no advertising matter other than incidental announcements of books, when mailed *under such regulations as the Postmaster General may prescribe * * **" [Italics supplied.] This language, it is submitted, clearly empowers the Postmaster General to exercise judgment and discretion in determining the classification of matter offered for mailing under the Act and to promulgate regulations to that end. "Books" not being defined, it is obvious that the Postmaster General is authorized to define the term, as he must define "incidental blank spaces for students' notations" and "advertising matter."

Appellant suggests (Br. 15) that the Postmaster General's authority to issue regulations under the Act was confined to "the way and manner of mailing." While it is true that the language specifically authorizing the issuance of regulations

follows immediately the words "when mailed," it would be a strained construction to limit their meaning to "way and manner of mailing." This is especially true in view of the obvious necessity to exercise discretion in classifying mail under the law, and the consequent need to issue regulations on the subject. This conclusion is reinforced by the fact that the Statute deals, not with procedure for mailing but with extension of a preferred postage rate to certain classes of material. Since it is logical to assume that the language granting the power to prescribe regulations applies to the subject matter of the legislation, it follows that it authorizes definition of the terms employed in the Act.

It is submitted, therefore, that the right of the Postmaster General to exercise his discretion in classifying appellant's publications finds its support in unequivocal language of the Statute. The language of the Act being plain and unambiguous in this respect, there is no need to refer to the legislative history. *Kuehner et al. v. Irving Trust Company*, 299 U. S. 445, 449 (1937); *Helvering v. City Bank Farmers Trust Co., Trustee*, 296 U. S. 85, 89 (1935). It may be mentioned, however, that the legislative history reveals a plain intention to confide in the Postmaster General the same discretion in classifying books as had been exercised under Executive Orders. This conclusion is compelled by the fact that Congress employed the identical language of the Executive Orders under which the book rate has been accorded since 1938—"under such regulations as the Postmaster General may prescribe"—(Ex. 14, Appellee's App. 19) after having had called to its attention the problems of administering the book rate, the manner in which the problems had been handled, and the vital necessity of leaving in the Postmaster General discretion in classifying books (Ex. 7, pp. 6-47).

(b) Administrative necessity

Not only does the language of the statute plainly authorize the Postmaster General to exercise his discretion in classifying publications for mailing under the Act of June 30, 1942, and to issue regulations to that end, but it is submitted that in no other

manner could the Act be effectively administered. It is obvious that there must be a central authority to classify mail matter under the several applicable Acts of Congress.² Uniformity in classifying mailing matter so as to apply the same rate to like matter is imperative. "Books" being an ambiguous term at best, *Smith v. Hitchcock*, 266 U. S. 53, 59 (1912), it was the Postmaster General's duty to define the word as used in the Act of June 30, 1942.

That the definition of books is a proper and necessary subject of regulation was recognized in *Bittleston Collection Agency v. United States*, 75 Ct. Cls. 681 (1932), wherein the Court had before it a controversy hinging on the word "books" as used in the Act of February 28, 1935, 43 Stat. 1053, 1067. The Court said (p. 685):

The word "books" not being defined in the statute, the proper and effective administration of the law required the Postmaster General, by regulations, to specify what constitutes a book, as distinguished from other printed matter * * *.

In support of the Postmaster General's right to exercise his discretion in classifying mailing matter, see also *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 158 (1946); *Smith v. Hitchcock*, 226 U. S. 53, 58 (1912); *Bates and Guild Co. v. Payne*, 194 U. S. 106 (1904); *United States v. Cortelyou*, 28 App. D. C. 570 (1907).

It is apparent therefore that it was necessary for the Postmaster General to define "books." The absence of a uniform definition of the word would have reduced the administration

² Congressional recognition of the need for centralized administration of the Post Office Department is indicated by the provisions of 5 U. S. C. 369, obligating the Postmaster General "to instruct all persons in the Postal Service with reference to their duties * * * to superintend generally the business of the department and execute all laws relative to the Postal Service." Act of June 10, 1921, c. 18, § 304 (42 Stat. 24), R. S. 396. The Postmaster General, as head of the Post Office Department, is in addition, "authorized to prescribe regulations, not inconsistent with law, for the government of his department" and the "performance of its business." 5 U. S. C. 22, R. S. 161.

of the instant statute to a chaotic state, leaving postmasters throughout the country without guidance as to the classification of matter offered for mailing thereunder and tending to substitute the discretion of senders of mail matter for that of Congress.

II

The Postmaster General's regulation of October 9, 1944, was a reasonable exercise of discretion

(a) The regulation accorded with the legislative history of the Act

Appellant contends that the legislative history of the Act shows the intention of Congress to extend the book rate to publications similar in construction and character to the publications here involved (Br. 25-37).

It is submitted, however, that the legislative history supports appellee's position that the Act authorized his refusal to grant the preferred postage rate to publications other than those of a permanent character. Although the legislative history concededly shows an intention to extend the book rate to "educational textbooks * * * commonly referred to as work-books," no statement has been found to support the suggestion that Congress intended to extend the rate to publications other than books. It is significant in this regard to note that Congress, in supplanting the Executive Orders by which the book rate had been accorded, included the words "with incidental spaces for students' notations" but retained the word "books" as the fundamental guide for the Postmaster General.

The question of perforated pages was not called to the attention of the Committee on the Post Office and Post Roads and was not discussed. This is evident throughout the testimony of Mr. Holgersen, Vice President of appellant (Jt. App. 42); Mr. Lambert, former clerk of the Post Office and Post Roads Committee (Jt. App. 52); and Mr. Wentzel, Deputy Third Assistant Postmaster General and formerly Superintendent of the Division of Classification (Jt. App. 64-65). To the contrary, statements in the report of hearings before the Committee (Ex. 7) show clearly that it was the intention of the proponents of the

legislation that it should apply only to publications of a permanent character.³

Moreover, it is to be noted that the feature of permanency is obviously an appropriate consideration in classifying publications as books (Jt. App. 62). The result which would otherwise ensue is well illustrated by the testimony, on behalf of appellant, that Exhibit 5, which contains a series of tests, is a book. All the pages in this Exhibit, including the back and front cover pages, are perforated for ready removal; the pages are not consecutively numbered; and the publisher's notice of copyright appears at the bottom of each sheet (Jt. App. 42-48). The testimony was that even after the pages are removed the remaining portion (which would consist of a collection of white slips of paper approximately 11 inches long, $\frac{1}{4}$ of an inch wide, and $\frac{1}{16}$ of an inch thick, held together with two light wire staples, and containing no lettering or printed matter) would constitute a book (Jt. App. 43). It seems apparent that such a publication, which is reducible and intended to be re-

³ Congressman Curtis, who introduced the bill which was finally enacted, testified at the hearing (Ex. 7, pp. 22-23):

"It is true that the word 'book' should not be made so broad or so loose that any kind of pamphlet or notebook or something one may buy at a store as a calendar should go through the mails at this preferential rate of postage.

* * * * *

"* * * I think the Department has made the suggestion that a book of that [indicating] type is not permanent. I, as an old school teacher, think *it is one of the most permanent books we have*. The youngsters keep such a book and use it for purposes of review. They keep such books many years." [Italics supplied.]

Congressman Hendricks, member of the Committee, stated:

"* * * I find that with the cloth-bound books, without space for notations, the pupils have to work on separate sheets of paper, which are destroyed or lost, but if they can make notes in blank spaces in the book, they are more likely to *retain* those notes" (Ex. 7, p. 26). [Italics supplied.]

Morris L. Ernst, Counsel to the National Committee to Abolish Postal Discrimination Against Books, New York City, testified that it was important to the Nation to continue the dissemination and expansion of material in book form covering "material of an enduring nature" (Ex. 7, p. 14).

The Committee had before it also the Department's regulations, placed in evidence by Mr. North, Deputy Third Assistant Postmaster General, to the effect that the book rate, as established by Presidential proclamation, did not apply to "books in any other than final or permanent form" and did apply to books "permanently bound" (Ex. 7, p. 9).

duced to the state indicated by the testimony in order to be of practical use in connection with the purpose for which it is designed, is not a "book."

(b) The regulation accorded with long standing and consistent policy of the Post Office Department

In support of its argument that Congress did not intend to limit books to permanently bound publications, appellant has suggested that the requirement that books be permanently bound in order to be entitled to the preferred rate provided by the 1942 Act was not promulgated until October 9, 1944 (Br. 19, 38). In this connection appellant argues that the word "book" had a well-defined meaning when it was used in the Act (Br. 15), and, to establish that meaning, appellant relies upon a Post Office regulation which makes no reference to permanency. This argument of appellant appears to be based on the proposition that Congress used the term "book" in the sense it had previously been given by the Post Office Department.

It is submitted that prior to the enactment of the Act of June 30, 1942, the Post Office Department consistently defined "books" as publications which are permanently bound. Prior to 1938 the definition was given in determining whether a publication was entitled to a book rate as third class mail (Jt. App. 61-63). After the President's Executive Order of October 31, 1938 (Appellee's App. 19), which was the forerunner of the 1942 Act, it was consistently held that the book rate applied to permanently bound books and did not apply to publications in other than final or permanent form (Appellee's App. 22 et seq.; Jt. App. 61-63, 77-96.) This consistent administrative interpretation was before Congress when it considered the 1942 Act (Ex. 7, p. 7 et seq.). Upon enactment of the 1942 Act the same regulations were made applicable in its administration (Appellee's App. 24).

Thus, it appears that the Postmaster General's definition of "books," of which appellant complains, was in no wise an innovation but, rather, a "reaffirmation of existing regulations."

As such it should not be overturned unless clearly erroneous. *Bittleston Collection Agency v. United States*, 75 Ct. Cls. 681, 685 (1932). Moreover, applying appellant's reasoning, it may be assumed that Congress adopted the Postmaster General's definition of the word. Being consistent with the language of the Statute as well as its legislative history, the definition should be accepted as proper by this Court. *United States et al. v. American Trucking Associations, Inc.*, 310 U. S. 534 (1940); *Porter v. Murray*, 156 F. (2d) 781, 786 (C. C. A. 1, 1946); *Sutherland, Statutes and Statutory Construction* (3rd Ed. Horack, 1943), §§ 5101 et seq.

III

The Postmaster General's determination that appellant's publications are not books within the statute and regulation was reasonable

The definition of a book as a volume "permanently bound" being authorized and proper, the question remains as to whether the Postmaster General erred in determining that appellant's publications were not entitled to the book rate. His judgment, under familiar principles, should not be reversed so long as it was reasonable and not plainly erroneous. *Leach v. Carlile*, 258 U. S. 138 (1922), and cases cited there; *United States v. Cortelyou*, 28 App. D. C. 570 (1907).

The publications involved in this appeal are in the record (Exhibits 1 to 6) and are described in detail in the footnote.* In general they may be described as paper or heavy paper-bound pamphlets. One (Ex. 5) has all pages perforated, including the cover. All the pages in Exhibits 1, 2, and 6 are perforated, but

* The six publications involved may be described as follows:

The pamphlet entitled "*New Plain Way English Exercises—Self Correcting Laboratory Plan*" (Ex. 1) contains 110 pages and a foresheet. All of the pages are perforated throughout its entire length for ready removal, and, with the exception of the foresheet, all of the pages bear at the top a blank space for the insertion of the name of the user and his score. On each sheet, except the foresheet, at the bottom of the page appears a notice of copyright. The foreword describes the contents as "exercises" and indicates that the exercises therein are keyed by section numbers to "*Plain English Handbook*." There is no textual or instructional material on the

the covers are not. Exhibits 3 and 4 contain similar perforated pages interspersed among pages which are not perforated. In addition to the perforated pages, the pamphlets have other characteristics indicating their "nonpermanent" character, such as blank spaces at the tops of pages for the names of student and teacher, score, and other data, notice of copyright on the perforated pages, and directions in some of the pamphlets explaining the procedure for removal of the pages.

subject to which the exercises relate. On the reverse side of the foresheet appears the following statement:

"Although the exercises may be used in a variety of ways, *perhaps most teachers will prefer to have each sheet detached and handed in on the completion of the two pages.*" [Italics supplied.]

The pamphlet entitled "*Individual Corrective Exercises for Elementary School English—Book 6*" (Ex. 2) contains 94 pages and an aftersheet, and all pages therein are perforated. All but six pages bear blank spaces at the top for the name of the user, teacher, and score. Notice of copyright appears on all sheets except two foresheets and the aftersheet. The foreword describes the contents as a "series of exercises."

The pamphlet entitled "*Essentials in English—Laboratory Method—Book II, New Edition*" (Ex. 3), consists of 142 pages, eight forepages, and an aftersheet. In addition, it contains 18 sheets or 36 pages which are perforated, and on forepage v the following statements appear:

"In the work in punctuation, word study, and correct usage, *a number of pages have been perforated.* This not only facilitates the classroom work for the student but also decreases the amount of homework. The average high school student has an aversion to that subject which necessitates hours of outside preparation.

* * * * *

"The student works his lesson, checks it by the answer card, records, on the score card in the back of his book, the number of errors that he has made, *and places his paper on the teacher's desk.*" [Italics supplied.]

The pamphlet "*Essentials in English—Laboratory Method—Book IIP*" (Ex. 4), contains 190 pages and eight forepages. In addition, it contains 13 sheets or 26 pages which are perforated to facilitate their ready removal, and on forepage v there are set forth statements with respect to perforation of the pages and placing thereof on the teacher's desk which are identical to those found in Exhibit 3, above quoted.

The pamphlet entitled "*Essentials in English—Laboratory Method—Tests Book I, New Edition—Form 12R*" (Ex. 5) consists of 24 unnumbered pages, including the outside cover pages on the front and back. All pages are perforated, including the front and back covers, to facilitate their ready removal, and the pamphlet is divided into a series of so-called tests, consisting, with two exceptions, the first and the last, of single sheets, with spaces for the name of the student, the instructor, score, section, and date at the head of each "test." On each sheet at the bottom of the page appears a notice of

These pamphlets, consisting in whole or in part of exercise sheets intended for removal, contain pages obviously designed for removal. Accordingly, it is submitted that the Postmaster General reasonably exercised his discretion in determining they were not permanently bound and were not books within the meaning of the Act. No other action by him would have been reasonable in view of the established practice of the Post Office Department that publications with pages designed for removal are not books and in view of the legislative enactment passed in the light of such practice.⁵

IV

There is no merit to other contentions urged by appellant

The contention of appellant that its publications were accorded the book rate prior to March 30, 1944, and that the Department at that time unlawfully changed the classification in violation of due process (Br. 42-47) is in direct conflict with the evidence.

copyright. There is no textual or instructional material on the subject to which the tests relate.

The pamphlet entitled "*Cumulative Review—Plain Way English Book IV*" (Ex. 6) consists of 62 pages and a foresheet, all of which are perforated to facilitate ready removal. At the top of most of the pages there appear blank spaces for the name of the student and his score, and there is a notice of copyright at the bottom of each page except the foresheet. There is no textual or instructional material, and the foreword describes the contents as "exercises" which are keyed by numbers to sections of "Plain English Handbook." The foresheet contains the following statement:

"To facilitate scoring, *the teacher may distribute the marked exercises among the students*, allowing them to do the checking; but the teacher only should score all tests and should keep a permanent record of these scores." [Italics supplied.]

⁵ It may be suggested, at least as to Exhibits 1, 5, and 6, that there is an additional basis on which to justify the judgment of the Postmaster General. The legislative history makes it apparent that Congress had in mind extension of the book rate only to "educational textbooks * * * referred to as workbooks." App. 69-76; Exhibit 7, pp. 14, 15, 17, 21-25, 29, 45, 46. This interpretation was adopted by the Postmaster General in his regulations (Exs. 17, 18, 20, Appellee's App. 24 et al.). The three Exhibits named contain no instructional material, however, and therefore it would seem they are not textbooks.

Prior to the passage of the 1942 Act appellant's publications were not entitled to the book rate because they did not consist "wholly of reading matter." After the passage of the Act, and as early as September 22, 1942, the Third Assistant Postmaster General wrote to the Postmaster at Wichita, Kansas, in answer to the latter's inquiry, advising him that one of appellant's publications "consisting in its entirety of perforated pages, with blank spaces at the head of each test sheet for the name of the student and instructor, date, etc., showing that the pages are designed for removal," was not entitled to the book rate (Jt. App. 77). Appellant's Vice President testified that this ruling had been called to the attention of appellant (Jt. App. 46-47). Precisely the same ruling was made in the Department's letter of February 21, 1944, to the postmaster at Atlanta (Jt. App. 79) and in the letter of March 30, 1944, to the postmaster at Columbus (Jt. App. 82). Moreover, the Deputy Third Assistant Postmaster General stated by affidavit that the Department had not accorded the book rate to appellant's publications or changed the classification thereof (Jt. App. 21). This testimony was not refuted; there was an allegation that appellant's publications were mailed at the book rate, but it seems clear that such mailing occurred without knowledge of appellee, appellant's witness having testified that the packages were labeled "books" and offered for mailing without calling the postmaster's attention to the fact they contained pamphlets with perforated pages (Jt. App. 46).

It therefore appears conclusively that no change was ever made in the classification of appellant's publications and, consequently, that no change was made in violation of due process of law.

There is likewise no merit to appellant's contention (Br. 42) that it has been subjected to unlawful discrimination because "up to a short time prior to the trial of this cause, the benefits of the book postage rate had been extended to appellant's competitors who sold and distributed workbooks * * * practically identical in composition with the books here involved."

Appellant apparently concedes that discrimination no longer exists. Moreover, the Department's rulings to postmasters af-

fecting appellant (Ex. 21) and other publishers (Exs. 22 and 35) were consistent to the effect that publications containing perforated pages and other characteristics showing such pages to be intended for removal are not acceptable at the book rate (Jt. App. 61-63, 77-96). While it is true that several parcels containing publications with blank spaces and perforated pages were mailed in 1944 and 1945, such mailings are of no significance in light of the evidence that the Department had not "permitted" them to be mailed at the book rate (Jt. App. 22). The evidence was that such publications were transmitted in the United States mails only because of the endorsement "books" thereon and without knowledge of the contents on the part of postmasters and subordinate employees of the Department and were, in fact, presented for mailing in violation of the Act of June 30, 1942, and regulations adopted thereunder. Mention was made of the physical impossibility for employees of the Department to inspect the contents of all parcels presented for mailing (Jt. App. 21-22). The evidence shows also that the Third Assistant Postmaster General, immediately upon receipt of information concerning the mailing of these publications at the book rate, informed postmasters at the points of mailing of the information obtained, and reminded them of the applicable regulations so that a recurrence of such mailings could be avoided (Ex. 35, Jt. App. 22, 90-96). These facts demonstrate, it is submitted, the absence of any discrimination by the Postmaster General in extending the book rate to appellant's competitors.

Finally, appellant has maintained that its publications are in competition with conventional type textbooks which are afforded the lower rate, with resulting discrimination to appellant. The answer to this contention is found in the fact that appellant's publications are not permanently bound, while the so-called "conventional type textbooks" presumably are. The source of appellant's complaint therefore is not discrimination by the Postmaster General but is the difference under the Act between its publications and "books." The publications not being comparable, it cannot be said that there is discrimination. *Barbier v. Connolly*, 113 U. S. 27 (1885).

CONCLUSION

It is respectfully submitted that the judgment of the court below in dismissing the petition was proper and should be affirmed.

(s) George Morris Fay,
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United States Attorney.

(s) Daniel B. Maher,
DANIEL B. MAHER,
Assistant United States Attorney.

(s) Sidney S. Sachs,
SIDNEY S. SACHS,
Assistant United States Attorney.

Of Counsel:

Paul Meininger,
PAUL MEININGER,
*Attorney, Office of the Solicitor,
Post Office Department.*

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STATUTES AND REGULATIONS

Pertinent excerpts from applicable statutes and regulations are set forth below in chronological order. Explanatory releases by the Postmaster General are set forth along with the regulations which they accompanied.

EXHIBIT 14

MODIFICATION OF POSTAGE RATES ON BOOKS—A PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES

THIRD ASSISTANT POSTMASTER GENERAL,
Washington, October 31, 1938.

WHEREAS I find after survey that the interests of the public, in the promotion of the cultural growth, education, and development of the American people, require that the postage rates on books of the class hereinafter described be modified:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States, * * * do proclaim that the postage rate on books consisting wholly of reading matter and containing no advertising matter other than incidental announcements of books, when mailed under such regulations as the Postmaster General shall prescribe, shall be for the period commencing November 1, 1938, and ending June 30, 1939, one and one-half cents a pound or fraction thereof, irrespective of the zone of destination.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this thirty-first day of October, in the year of our Lord nineteen hundred and thirty-eight and of the Independence of the United States of America the one and sixty-third.

[SEAL]

FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,

Secretary of State.

OFFICE OF THE POSTMASTER GENERAL,
Washington, October 31, 1938.

AMENDMENT TO THE POSTAL LAWS AND REGULATIONS

Order No. 12264.

In pursuance of a proclamation of the President dated October 31, 1938, the Postal Laws and Regulations are amended by the addition of paragraph 2½ to section 561 and a new section, 572½, reading, respectively, as follows:

"2½. Books consisting wholly of reading matter and containing no advertising matter, other than incidental announcements of books, in parcels not exceeding 8 ounces in weight and otherwise conforming to the conditions set forth in section 572½, may be mailed for the period November 1, 1938, to June 30, 1939, inclusive, at the postage rate of 1½ cents a pound or fraction thereof where such rate is less than that chargeable under existing regulations."

"572½. The postage rates on books consisting wholly of reading matter, containing no advertising matter other than incidental announcements of books, when mailed under such regulations as the Postmaster General may prescribe, shall be for the period commencing November 1, 1938, and ending June 30, 1939, 1½ cents per pound or fraction thereof, irrespective of the zone of their destination.

"2. A book, within the contemplation of this section, shall be a cloth- or paper-bound volume having 24 or more pages, of which at least 22 are printed, and shall not contain ruled or blank pages intended for records or memoranda purposes.

* * *

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*

*

"S. W. PURDUM,
"Acting Postmaster General."

OFFICE OF THE POSTMASTER GENERAL,
Washington, October 31, 1938.

NEW POSTAGE RATE ON BOOKS

There has long been a growing demand for a lower postage rate on books in order to encourage their distribution among the people of the Nation.

Although the Postal Service has had a special low rate of postage for small books, these rates did not apply to books weighing more than 8 ounces and they were, therefore, chargeable with postage at the regular parcel-post zone rates, except in the case of books mailed to and from public libraries.

It is hoped that the new rate on books will result in a substantial reduction in the prices of books to the ultimate consumer, thus making them more readily available to a larger number of our people. While the lower rate will benefit readers generally, it will be especially advantageous to the many millions of American people who live in rural sections remote from both libraries and book stores.

The new rate will become effective November 1, 1938, and continue until June 30, 1939, subject to a further extension after that date upon action by Congress. This 8 months' period will afford an opportunity to give the new rate a fair trial, and if it actually results in substantial reductions in the prices of books generally to the American public, it will have served its purpose as a factor in the cultural development of the people.

S. W. PURDUM,
Acting Postmaster General.

THIRD ASSISTANT POSTMASTER GENERAL,
Washington, October 31, 1938.

As indicated in the above proclamation of the President, the purpose of the reduced rate on books is to facilitate the distribution of books to the American people in order to promote their cultural growth and educational development, and, consequent-

ly, while there will be some mailing of books in bulk, it is contemplated that the greatest use of this new low rate will be found in the mailing of individual books direct to readers.

ROY M. NORTH,
Acting Third Assistant Postmaster General.

EXHIBIT 15

INFORMATION REGARDING THE NEW POSTAGE RATE ON BOOKS

THIRD ASSISTANT POSTMASTER GENERAL,
Washington, November 17, 1938.

In view of the numerous inquiries regarding the new book rate of $1\frac{1}{2}$ cents a pound, effective November 1, 1938 (par. $2\frac{1}{2}$, amended sec. 561, and new sec. 572 $\frac{1}{2}$, Postal Laws and Regulations), postmasters are advised as follows:

* * * * *

Among the types of books to which the new rate applies are the following:

Books *permanently* bound by stitching or stapling, in paper, cloth, leather, spiral, or plastic binding, so far as binding is concerned.

* * * * *

Among the publications to which the new rate does not apply may be mentioned:

* * * * *

Books of the loose-leaf binder type designed to facilitate removing or adding pages.

* * * * *

Publications such as textbooks having blank spaces for written answers or other handwork.

* * * * *

RAMSEY S. BLACK,
Third Assistant Postmaster General.

EXHIBIT 16

FURTHER INFORMATION REGARDING THE NEW POSTAGE RATE
ON BOOKS

THIRD ASSISTANT POSTMASTER GENERAL,
Washington, December 21, 1938.

This notice supplements and supersedes the notice of November 17, 1938, the information regarding the application of the new book rate of 1½ cents a pound given in the notice of November 17, being embodied herein together with additional information.

The new rate does not apply to the following:

* * * * *

Publications, including textbooks, having blank spaces for written answers or other hand work.

* * * * *

Books in any other than final or permanent form.

Among the publications to which the new book rate does apply, the following are mentioned:

Books *permanently* bound by stitching or stapling, or by means of spiral or plastic binding, when covered with paper, cloth, leather, or other substantial material.

* * * * *

RAMSEY S. BLACK,
Third Assistant Postmaster General.

The Act of June 30, 1942, c. 459 (56 Stat 462), 39 U. S. C. 293a-1 (1940 ed., Sup. IV):

The postage rate on books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations and containing no advertising matter other than incidental announcements of books, when mailed under such regulations as the Postmaster General may prescribe, shall be 3 cents per pound or fraction thereof, irrespective of the postal zone of

destination thereof; *Provided*, That this Act shall not affect the rates of postage on books mailed by or to libraries and organizations as prescribed by the Act of February 28, 1925, as amended.

EXHIBIT 17

"Reprint of notice which appeared IN THE POSTAL BULLETIN
OF JULY 1, 1942"

ORDER OF THE POSTMASTER GENERAL

Order No. 18100.

AMENDMENT TO THE POSTAL LAWS AND REGULATIONS

POSTAGE RATE ON BOOKS

Paragraph 3, section 561, Postal Laws and Regulations, is amended to read as follows:

"The postage rate on books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations and containing no advertising matter other than incidental announcements of books, when mailed under such regulations as the Postmaster General may prescribe, shall be 3 cents per pound or fraction thereof, irrespective of the postal zone of destination thereof: *Provided*, That this Act shall not affect the rates of postage on books mailed by or to libraries and organizations as prescribed by the Act of February 28, 1925, as amended" (39 U. S. C., 1934 ed., Sec. 293a). Act of June 30, 1942, 77th Congress.

Paragraphs 5 and 6, section 572, Postal Laws and Regulations, are amended to read as follows:

"5. The postage rate on books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations and containing no advertising matter other than incidental announcements of books, when mailed under such regulations as the Postmaster General may prescribe, shall be 3 cents per pound or fraction thereof, irrespective of the

postal zone of destination thereof *Provided, That this Act shall not affect the rates of postage on books mailed by or to libraries and organizations as prescribed by the Act of February 28, 1925, as amended (39 U. S. C., 1934 ed., Sec. 293a). Act of June 30, 1942, 77th Congress.*

"6. A book, within the contemplation of paragraph 5, shall be a cloth- or paper-bound volume having twenty-four or more pages of which at least twenty-two are printed, and **with the exception of textbooks containing incidental spaces for students' notation**, shall not contain ruled or blank pages intended for records or memoranda purposes."

EXHIBIT 18

"Reprint of notice which appeared in the Postal Bulletin of July 10, 1942"

INSTRUCTIONS OF THIRD ASSISTANT POSTMASTER GENERAL

MAILING OF BOOKS AT POSTAGE RATE OF 3 CENTS A POUND

In connection with the act of June 30, 1942 (embodied in par. 3, sec. 561, and pars. 5 and 6, sec. 572, Postal Laws and Regulations, as amended by Order No. 18100 published in the July 1, 1942, issue of the Postal Bulletin), which increased the postage rate on books from 1½ cents to 3 cents a pound or fraction thereof, the following instructions are issued for the guidance of all concerned.

* * * * *

Although this law extends the new rate to books consisting of reading matter with incidental blank spaces for students' notations, such rate does not apply to any other publications not previously acceptable at the former rate of 1½ cents a pound.

* * * * *

THE NEW RATE DOES NOT APPLY TO THE FOLLOWING:

* * * * *

Publications other than textbooks, having blank spaces for written entries, records, or other hand work, such as almanacs, diaries, memorandum books, and similar publications.

* * * * *

Books in any other than final or permanent form.

* * * * *

AMONG THE PUBLICATIONS TO WHICH THE NEW BOOK RATE DOES APPLY, THE FOLLOWING ARE MENTIONED:

Textbooks with incidental blank spaces for students' notations. Books permanently bound by stitching or stapling, or by means of spiral or plastic binding, when covered with paper, cloth, leather, or other substantial material, and having 24 or more pages, of which at least 22 are printed.

The Act of June 30, 1942, *supra*, was amended by Section 403 of the Act of February 25, 1944, c. 63, title IV (58 Stat. 69), 39 U. S. C. 293 (1940 ed., Sup. IV), which increased the rate temporarily by 3 per centum.

EXHIBIT 19

"Reprint of notice which appeared in the Postal Bulletin of July 18, 1944"

ORDER OF THE POSTMASTER GENERAL

FOURTH-CLASS POSTAGE

Order No. 25380; Dated July 17, 1944.

That part of paragraph 2, section 571, Postal Laws and Regulations of 1940, preceding subparagraph (a), is amended to read as follows:

"2. The postage on matter of the fourth class shall be as * * * below indicated plus, for the period between March 26, 1944, and the first day of the first month which begins at least 6 months after the termination of hostilities in

the present war, the increase provided by the Act of February 25, 1944, of 3 per centum, fractions of one-half cent or more being computed as 1 cent, but in no case shall the increase per parcel be less than 1 cent" (39 U. S. C. 293; P. M. G. Orders, July 14, 1931, April 7, 1932; Act of February 29, 1944, Public Law 235).

EXHIBIT 20

"Reprint of notice which appeared in The Postal Bulletin of October 10, 1944"

ORDER OF THE POSTMASTER GENERAL

AMENDMENT TO THE POSTAL LAWS AND REGULATIONS DATED
OCTOBER 9, 1944

Order No. 26165:

Insert No. 280.

Defining the Word "Book"

Paragraph 6 of section 572, Postal Laws and Regulations of 1940, as amended, is further amended to read as follows:

"6. A book, within the contemplation of paragraph 5, shall be a volume **permanently** bound in cloth or paper having 24 or more pages, of which at least 22 are printed, and, with the exception of textbooks containing incidental spaces for students' notations, shall not contain ruled or blank pages intended for records or memoranda purposes."

JOINT APPENDIX

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9235

THE McCORMICK-MATHERS PUBLISHING COM-
PANY, A Corporation, *Appellant*,

v.

ROBERT E. HANNEGAN, Postmaster General of the
United States, *Appellee*.

**Appeal from the District Court of the United States for the
District of Columbia.**

*United States Court of Appeals
for the District of Columbia*

FILED MAY 15 1946

Joseph W. Stewart

CLERK

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**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS.**

1

Filed Aug 2 1945

In the District Court of the United States
For the District of Columbia

Civil Action No. 27337

THE McCORMICK-MATHERS PUBLISHING COMPANY,
a corporation, *Plaintiff*,

v.

ROBERT E. HANNEGAN, Postmaster General of the United
States, *Defendant*.

Amended Petition for Injunction

Comes now the plaintiff in above entitled cause and for
its bill of complaint and cause of action against the defend-
ant states as follows, to-wit:

1. That the defendant herein is the duly appointed and
acting Postmaster General of the United States, and is the
successor of Frank C. Walker, the original defendant
herein.

2. That the defendant herein is a resident of the District
of Columbia.

3. That the plaintiff herein is and was at all times herein
mentioned a corporation duly organized and existing under
and by virtue of the laws of the State of Kansas and hav-
ing its office and principal place of business in the City of
Wichita and State of Kansas, and that the plaintiff is a
legal resident of the State of Kansas, and a non resident
of the District of Columbia.

4. That the plaintiff herein has and maintains branch
offices for the conduct of its business in the Cities of
Columbus, Ohio, and Atlanta, Georgia.

5. That the plaintiff is and has for many years been engaged through its main and branch offices in the publication, sale and distribution of school text books of a class commonly called "work books" widely used by students, teachers, public and private schools and other institutions of learning in the United States.

6. That the plaintiff herein is, and was at all times herein mentioned, through its principal office located in the City of Wichita and State of Kansas, and its branch offices located at Columbus, Ohio, and Atlanta, Georgia, engaged in the publication, sale and distribution of the following described school text books consisting wholly of reading matter with incidental blank spaces for students' notations and containing no advertising matter other than incidental announcements of books, and being in final and complete form for use by teachers and students, namely:

(1) "New Plain Way English Exercises-Self-Correcting Laboratory Plan-Book I"

(2) "Individual Corrective Exercises For Elementary School English-Book VI"

(3) "Essentials In English-Laboratory Method Book II" (New Edition)

(4) "Essentials In English-Laboratory Method-Book III"

(5) "Essentials In English-Laboratory Method-Test Form #12 R"

(6) "Cumulative Review-Plain Way English-Book IV"

(7) "Essentials In English-Laboratory Method, Book I" (New Edition)

(8) "Test 14R for Essentials In English-Laboratory Method, Book I" (New Edition)

(9) "Test 21R for Essentials In English—Laboratory Method, Book II" (New Edition)

(10) "Test 22R for Essentials In English-Laboratory Method, Book II" (New Edition)

- (11) "Test 24R for Essentials In English-Laboratory Method-Book II" (New Edition)
- (12) "Test 30 for Essentials In English-Laboratory Method-Book III"
- (13) "Test 31 for Essentials In English-Laboratory Method-Book III"
- (14) "A Study Guide In English Literature"
- (15) "A Study Guide In American Literature"
- (16) "Test for New Plain Way English Exercises-Book I"
- (17) "New Plain Way English Exercises-Book II"
- (18) "Test for New Plain Way English Exercises-Book II"
- (19) "New Plain Way English Exercises-Book III"
- (20) "Test for New Plain Way English Exercises-Book III"
- (21) "Sentence Mastery-Plain Way English Book V"
- (22) "Review For Mastery In English-Plain Way English Book VI"
- (23) "English For Success"
- (24) "Exercises-English For Success"
- (25) "Individual Corrective Exercises For Elementary School English-Book 2"
- (26) "Individual Corrective Exercises For Elementary School English-Book 3"
- (27) "Individual Corrective Exercises For Elementary School English-Book 4"
- 3 (28) "Individual Corrective Exercises For Elementary School English-Book 5"
- (29) "Growing Up With Numbers—Book I"
- (30) "Growing Up With Numbers—Book 2"
- (31) "Growing Up With Numbers—Book 3"
- (32) "Growing Up With Arithmetic—Book 4"
- (33) "Test for Growing Up With Arithmetic—Book 4"
- (34) "Growing Up With Arithmetic—Book 5"
- (35) "Test for Growing Up With Arithmetic—Book 5"
- (36) "Puzzle Pages—Book I"

- (37) "Puzzle Pages—Book II"
- (38) "Puzzle Pages—Book III"
- (39) "Puzzle Pages—Book IV"
- (40) "What To Eat—How To Prepare It"
- (41) "What To Wear—How To Make It"
- (42) "Toward The Future In America"
- (43) "Test for Toward The Future In America"
- (44) "Our World Through The Centuries"
- (45) "Personal Analysis And Vocational Problems"
- (46) "Exploring The Library"
- (47) "Fundamentals Of Electricity"
- (48) "General Electricity"
- (49) "Introduction To Applied Drawing"
- (50) "Study Guides In Woodwork"
- (51) "Units In Sheet Metal Work"
- (52) "Units In Bench Metal Work"
- (53) "Units In Etching, Spinning, Raising, And Tool-
ing Metal"
- (54) "Units In Patternmaking And Founding"
- (55) "Units In Forging And Welding"

7. That all of above described books consist wholly of reading matter with incidental blank spaces for students' notations and contain no advertising matter other than incidental announcements of books and all of the same are paper-bound volumes having 24 or more pages, of which at least 22 are printed, and are text books containing incidental spaces for students' notations. That said books are printed, sold and distributed in final and complete form for student use in schools of learning and education

4 and are text books and commonly known and described as "work books."

8. Plaintiff further states that all of the above described text books consist wholly of reading matter or reading matter with incidental blanks for students' notations and that under the terms and provisions of the Act of the Seventy-Seventh Congress of the United States of June 30,

1942, and entitled, "An Act To Provide For A Permanent Postage Rate Of Three Cents A Pound On Books," (39 U.S.C.A., Sec. 293a) as amended by Section 403 of the Act of February 25, 1944, (C63, Title IV, 58 Stat. 69), plaintiff is entitled to have the same carried through the mails of the United States at a postage rate of 3¢ per pound, or fraction thereof, plus 3%.

9. Plaintiff further states that it was the express intent and purpose of the Congress of the United States, as shown by the Congressional Records, debates, Committee Hearings, Committee Reports, hearings held before and reports of the Committee on Post Offices and Post Roads of the House of Representatives, the Conference Report of the Joint Committee of the Senate and House of Representatives and other records of the Congress, in adopting said Act on June 30, 1942, to provide by law that school text books or "work books" of the character published and distributed by the plaintiff and hereinbefore described, and which in recent years have been widely used by educational institutions, should be carried through the United States mails at a postage rate of 3¢ per pound, plus 3%. That immediately after the adoption thereof and until on or about the 30th day of March, 1944, the predecessor of the defendant herein accepted and received the said books published by the plaintiff as mailable at a postage rate of 3¢ per pound. That the defendant and his predecessor arbitrarily, unlawfully and in direct violation of said postal law have denied and defendant now denies plaintiff the right and privilege of having its said described books carried through the United States mails at said book postal rate, although all of the same are of such kind, class, character and classification as to entitle the plaintiff to the benefit of said book rate.

10. Plaintiff further states that subsequent to the approval of said Act by Congress and in obedience to the terms and provisions thereof and on July 1, 1942, Frank C. Walker, then Postmaster General of the United States,

the predecessor of defendant, issued and adopted the following amendment to the postal regulations relative to the postage rate on books:

5 "Paragraph 3, Section 561, Postal Laws and Regulations, is amended to read as follows:

'The postage rate on books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations and containing no advertising matter other than incidental announcements of books, when mailed under such regulations as the Postmaster General may prescribe, shall be 3 cents per pound or fraction thereof, irrespective of the postal zone of destination thereof: Provided, That this Act shall not affect the rates of postage on books mailed by or to libraries and organizations as prescribed by the Act of February 28, 1925, as amended (39 U.S.C., 1934 Ed., Sec. 293a). Act of June 30, 1942, 77th Congress.'

"Paragraphs 5 and 6, Section 572, Postal Laws and Regulations, are amended to read as follows:

'5. The postage rates on books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations and containing no advertising matter other than incidental announcements of books, when mailed under such regulations as the Postmaster General may prescribe, shall be 3 cents per pound, or fraction thereof, irrespective of the postal zone of destination thereof: Provided, That this Act shall not affect the rates of postage on books mailed by or to libraries and organizations as prescribed by the Act of February 28, 1925, as amended (39 U.S.C., 1934 Ed., Sec. 293a). Act of June 30, 1942, 77th Congress.

6. A book, within the contemplation of paragraph 5, shall be a cloth or paper-bound volume having twenty-four or more pages, of which at least twenty-two are printed, and with the exception of text books containing incidental spaces for students' notations, shall not contain ruled or blank pages intended for records or memoranda purposes.' "

11. Plaintiff further states that subsequent to July 1, 1942, and prior to March 30, 1944, it was accorded the right and privilege by defendant's predecessor of having the books hereinbefore described, when posted at the post offices in Wichita, Kansas, Columbus, Ohio, and Atlanta, Georgia, carried through the United States mails and delivered to its customers at said book rate of 3¢ per pound and that the predecessor of defendant herein on or about the 30th day of March, 1944, arbitrarily, in violation of law, without notice to plaintiff, and without any hearing, instructed and caused the United States Postmasters at Wichita, Kansas, Columbus, Ohio, and Atlanta, Georgia, to thereafter refuse in the mails and to carry through the mails the above described books at the postage rate of 3¢ per pound, plus 3%, even though same were properly packaged and addressed in accordance with applicable postal regulations, and notified the plaintiff herein that none of the books hereinbefore described and referred to were mailable at said book rate and that none of said books would be permitted to pass through the mails at said book rate and would not be accepted for mailing from plaintiff or carried through the mails unless postage at the parcel post

rate, which is and was greatly in excess of said book
6 rate, was paid for and affixed thereto. That the de-

fendant herein and his predecessor have arbitrarily and unlawfully instructed and caused and defendant continues to require, cause and instruct the United States Postmasters at Wichita, Kansas, Columbus, Ohio, and Atlanta, Georgia, and elsewhere, to deny unto the plaintiff herein the right and privilege of having its said books carried through the United States mails at said book rate, and that said United States Postmasters in obedience to such instructions have denied, still deny, and in the future will continue to deny unto the plaintiff the right and privilege of having said books carried through the United States mails, irrespective of the postal zone of destination thereof, at a postage rate of 3¢ per pound, plus 3%, as fixed by the

Acts of Congress aforesaid with amendments thereto and that the said action of the defendant herein is arbitrary and in violation of law.

12. Plaintiff states that the said school books sold and distributed by it are sold in competition with other school "work books" which contain blank spaces for students' notations, which have perforated pages and which are of the same kind and character as those published and sold by plaintiff, and in competition with school text books without incidental blank spaces for students' notations and that defendant herein has accorded and is according to publishers and distributors of such books the privilege of having their said books carried through the United States mails at said book postal rate, and has unlawfully and arbitrarily excluded, and caused to be excluded, from the United States mails plaintiff's said books at said postal rate and is arbitrarily and unlawfully demanding of the plaintiff herein a postal rate greatly in excess of 3¢ per pound, plus 3%, and a postal rate based upon the parcel post rate, which increases according to the postal zone of destination. That the effect of such action on the part of defendant is to extend postal service at a rate of 3¢ per pound, plus 3%, on books to one class of persons, that is, the publishers of books and text books without incidental blank spaces for student's notations and other publishers of "work books" similar to plaintiff's said books and to deny same to plaintiff. That defendant herein and his predecessor have unlawfully, without notice, and without hearing, or giving plaintiff the opportunity to be heard, unlawfully changed the postal classification of plaintiff's said books from the said "book rate" of three cents per pound plus 3% to the parcel post rate which is greatly in excess of the said "book rate."

7 13. Plaintiff further states that such action and threatened future action on the part of the defendant herein amounts to an unlawful discrimination and will cause irreparable damage and injury unto the plaintiff,

and that plaintiff has no adequate remedy or relief therefrom by any action at law. That if the plaintiff herein be denied the use of the mails to deliver its said books to its customers at the book rate of 3¢ per pound, plus 3%, as provided by the laws of the United States, and be required to pay a postal rate greatly in excess thereof it cannot compete with the publishers of other school text books which do not contain incidental blank spaces for students' notations and the publishers of other similar "work books" who are permitted to forward their books and publications to their customers through the United States mails at said book rate 3¢ per pound, plus 3%. That the difference under such circumstances in ultimate cost, including delivery charges to plaintiff's customers, will impair the market for plaintiff's books will and does necessarily increase the retail price thereof and will result in irreparable damage and injury unto the plaintiff, its customers and its established business.

14. Plaintiff further states that if it be denied the use of the mails in the manner as threatened by the defendant, and as heretofore ordered and directed by him, and that if it be denied the right and privilege granted it under the said Act of Congress to transmit its said school text books through the United States mails at the rate of 3¢ per pound, plus 3%, and if it be required to pay the parcel post rate upon its said books in order to transmit them through the mails, plaintiff and its customers will sustain and suffer a loss of many thousands of dollars. That more than fifty thousand customers are serviced out of plaintiff's main office at Wichita, Kansas, and its branch offices at Columbus, Ohio, and Atlanta, Georgia, and during the past years more than fifty thousand orders consisting of more than one million books were filled out of said offices. That the plaintiff herein and its customers, relying upon the terms and provisions of the said postal laws of the United States and upon the right to transmit said school text books through

the mails at the rate of 3¢ per pound, plus 3%, have entered into agreements concerning the sale and purchase through plaintiff of many thousands of said school text books, and that if the plaintiff and its customers be denied the right to have such books transmitted through the mails at the book rate of 3¢ per pound, plus 3%, and be required to pay a postal rate greatly in excess thereof both plaintiff and its customers will sustain and suffer irreparable loss and damage.

8 15. Plaintiff further states that the refusal of the defendant herein to accept for mailing in the United States mails and to carry through said mails plaintiff's said books at the book rate of 3¢ per pound, plus 3%, as provided for in the laws of the United States and the Postal Regulations hereinbefore referred to, and the acts and actions of defendant in ordering, directing and requiring the Postmasters of Wichita, Kansas, Atlanta, Georgia, and Columbus, Ohio, and elsewhere, to refuse to admit to the mails said books and to refuse to permit same to be carried through the mails at said book postage rate; which has resulted in a denial to the plaintiff of its rights and privileges under the Acts of the Congress of the United States as aforesaid; are arbitrary, in excess of the authority of the defendant and constitute an unlawful denial of rights and privileges granted unto the plaintiff under the postal laws of the United States. Plaintiff further states that such action and acts of the defendant are unlawful, unjust, unreasonable and void and in direct conflict with the acts of Congress hereinbefore referred to and beyond the power and authority of the defendant. Plaintiff further states that the defendant herein has, and will continue to cause plaintiff's said books to be excluded from and not carried through the United States mails at the lawful book postal rate of 3¢ per pound, plus 3¢, unless restrained and enjoined by this court, and that plaintiff has no adequate remedy or relief at law from said unlawful, oppressive and

illegal action and threatened action on the part of the defendant.

WHEREFORE, by reason of the premises, plaintiff prays this court to order and adjudge that the defendant herein be required to obey and observe the acts of Congress hereinbefore referred to and to give and extend unto the plaintiff the rights and privileges granted it thereunder, and that the defendant be perpetually enjoined and restrained from refusing to accept in and transmit, or from causing or directing others to refuse to accept in and transmit through the mails the school text books hereinbefore described at the postage rate fixed and determined in said act as amended and at the rate of 3¢ per pound, or fraction thereof, plus 3%; that the orders, instructions and directions of the defendant to the Postmasters at Wichita, Kansas, Atlanta, Georgia, and Columbus, Ohio, to the effect that plaintiff's said books are not entitled to be carried through

the United States mails at said book postage rate be
9 declared unlawful, unreasonable and void; that defendant be required by mandatory injunction to rescind such orders and directions and that he be perpetually enjoined from in any manner causing plaintiff's said books to be excluded from the United States mails at the book postage rate aforesaid, or from issuing any orders, directions or instructions to any of his subalterns, or to any United States Postmasters, to the effect that plaintiff's said books are not entitled to be received in and carried through the United States mails at said book postage rate or from taking any action which would in any manner deprive plaintiff herein of the right and privilege of having its said books accepted in and carried and transmitted through the United States mails at the book postage rate; that defendant be ordered, directed, and required to receive in, and transmit through the United States mails said described books at said book postage rate of three cents per pound plus 3%; and for such other and further relief as to the court may

seem just and proper in the premises, together with the costs of this action.

MILLIGAN, KIMBERLY & DEACY,
By THOS. E. DEACY,
901 National Fidelity Life Bldg.
Kansas City, Missouri

A. REA WILLIAMS
Investment Building
Washington, D. C.
Attorneys for Plaintiff.

Let this be filed. McGuire, J. 8/2/45.

* * * * *

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Filed Jun 25 1945

**Affidavit in Support of Applications for Temporary
Restraining Order and Preliminary Injunction.**

DISTRICT OF COLUMBIA, ss:

C. E. HOLGERSON, of lawful age, first being duly sworn according to law, upon his oath states as follows:

1. He is a resident of Wichita, Kansas and is Vice-President of the McCormick-Mathers Publishing Company, a corporation, plaintiff in the above-entitled cause and is authorized to and does make this affidavit for and on behalf of said plaintiff.

2. Plaintiff is incorporated under the laws of the State of Kansas, having its office and principal place of business in the City of Wichita, Kansas and also has and maintains branch offices for the conduct of its business in the cities of Columbus, Ohio and Atlanta, Georgia.

3. Plaintiff is and has for many years been engaged through its principal and branch offices in the publication, sale and distribution through the United States mails of school text books of the type commonly known as "Work Books" which are widely used by students, teachers, public and private schools, and other institutions of learning in the United States, said books being known and more particularly described as follows- to-wit:

"New Plain Way English Exercises—Self-Correcting Laboratory Plan—Book 1."

11 "Individual Corrective Exercises For Elementary School English—Book VI."

"Essentials in English—Laboratory Method—Book II New Edition."

"Essentials in English—Laboratory Method—Book III."

"Essentials in English—Laboratory Method—Test Form #12R."

"Cumulative Review—Plain Way English—Book IV."

4. All of the above described books consist wholly of reading matter with incidental blank spaces for students' notations and contain no advertising matter other than incidental announcements of books, all of the same are volumes permanently bound in paper, all have twenty-four or more pages of which at least twenty-two are printed and all of which are printed, sold, distributed and mailed by plaintiff in final and complete form for student use and for use in the hands of the purchasers thereof.

5. Plaintiff has no adequate or effective means of distributing its said books or of handling same to its customers who are scattered throughout the various states of the Union except through the use of the United States mails.

6. That the defendant herein, without notice to plaintiff, without any hearing, without giving the plaintiff any opportunity to be heard and in violation of due process has refused and will continue to refuse to accept said books for transmission through the United States mails at the "book rate" according to plaintiff and other citizens of the United States under the terms and provisions of the Act of the Seventy-seventh Congress of the United States, adopted June 30, 1942 and entitled "An Act to Provide for a Permanent Postage Rate of Three Cents Per Pound On Books" (39 U.S.C.A. Section 293(a)) with amendments thereto, and has without any hearing unlawfully changed the postal classification of said books from the "book rate" accorded by the said Act of June 30, 1942 to the parcel post rate

which is greatly in excess of said "book rate", and that the facts and circumstances concerning the foregoing are as follows: Subsequent to the adoption of said Act of June 30, 1942 and prior to March 30, 1944 plaintiff was accorded the right and privilege by defendant of having the books hereinbefore described when posted in Wichita, 12 Kansas, Columbus, Ohio and Atlanta, Georgia carried through the United States mails and delivered to its customers at said "book rate" of 3¢ per pound, and that the defendant herein on or about the 30th day of March, 1944 arbitrarily, in violation of law, without notice to plaintiff and without according any hearing to plaintiff instructed and caused the United States postmasters at Wichita, Kansas, Columbus, Ohio and Atlanta, Georgia and other of his subordinates to thereafter refuse in the mails and to carry through the mails the above described books at the "book rate" of 3¢ per pound even though same were properly packaged and addressed in strict accordance with applicable post regulations and notified the plaintiff herein that none of the said books herein referred to were mailable at said "book rate" and that none of the same would thereafter be permitted to pass through the mails at said "book rate" and would not be accepted by the Post Office Department for mailing from plaintiff or carried through the mails unless postage at the parcel post rate which is and was greatly in excess of said "book rate" was paid for and affixed thereto; that defendant herein has arbitrarily and unlawfully instructed and caused the United States postmasters at Wichita, Kansas, Columbus, Ohio and Atlanta, Georgia and other of his subordinates to deny to the plaintiff herein the right and privilege of having its said books carried through the United States mails at said "book rate"; and that the defendant herein, his subordinates and said United States postmasters as aforesaid, in obedience to the instructions of the defendant have denied, still deny and in the future will continue to deny unto the the plaintiff the right and privilege of having said books

carried through the United States mails irrespective of the postal zone of destination thereof at a postage rate of 3¢ per pound, plus 3% as fixed by the Act of Congress aforesaid, with amendments thereto; and that said action of the defendant is arbitrary, in violation of law and without due process; that the defendant herein by answering this cause has admitted that unless enjoined by the Court, he will continue to refuse to accept and transmit in the United States mails at the "book rate" accorded by the Act of June 30, 1942, supra, the books published
 13 by the plaintiff and hereinbefore described.

7. Affiant states that the said school books herein described are sold in competition with other school text and work books published by other publishers in the United States which consists of reading matter containing blank spaces for students' notations and which are identical in character, similar in content and printed, bound and prepared in the same manner as plaintiffs' books hereinbefore described, and that the defendant herein, since July 1, 1942 has accorded and is according to the said competitors of the plaintiff the privilege of having the books published and sold by them carried through the United States mails at said "book rate" of 3¢ per pound plus 3% but is denying such right and privilege to the plaintiff and is unlawfully requiring the plaintiff to pay the parcel post rate for the carriage of its said books through the mails, said parcel post rate being greatly in excess of said "book rate"; that such action on the part of the defendant constitutes an unlawful discrimination in favor of the many competitors of the plaintiff and against the plaintiff herein. Affiant further states that such discrimination on the part of the defendant has resulted and will result in irreparable injury to the business of the plaintiff in that when plaintiff is required to pay a postage rate greatly in excess of said "book rate" the selling price of its said books to its customers must necessarily be increased in ratio to the increase in its postage rate and as a direct result thereof the retail

price which plaintiff must demand and receive for its said books from its customers is increased and becomes in excess of the retail price at which its many competitors may sell their competitive publications; that if plaintiff herein be denied the use of the mails to deliver its books to its customers at the "book rate" of 3¢ per pound, plus 3% as provided by said Act of June 30, 1942, with amendments thereto, and be required to pay a postal rate greatly in excess thereof as required and demanded by the defendant, it can not compete with the said publishers of competitive school "work books" who are being permitted by

14 the defendant to forward their said competitive books through the United States mails at said "book rate" of 3¢ per pound, plus 3%; that the difference under such circumstances in ultimate cost to plaintiffs' customers will and has impaired the market for plaintiffs' said books and will result in irreparable damage and injury unto the plaintiff and its established business.

8. Affiant states that orders for at least 75% of the volume of its annual business are solicited during the months of July, August and September of each year, due to the fact that the schools customarily open in the United States during the month of September; that it is necessary that said orders be filled and the books ordered by plaintiffs' customers be delivered during said period of time; that in the work book industry in which plaintiff and more than one hundred competitors are engaged, it is the universal custom and practice that carrying charges and postage be added to the sale price of work books or that the same be charged to the customer in addition to such sale price; that if the competitors of the plaintiff be allowed as they have been by the defendant to mail the books published by them to their customers at the "book rate" provided in said Act and plaintiff be required to pay the much higher parcel post rate through the acts of the defendant, plaintiff will not be able to secure during the coming months of July, August and September orders for the sale of its books

which have already been printed and published, and plaintiff and its established business will suffer immediate and irreparable damage and injury.

9. Affiant further states that he has read the Petition for Injunction heretofore filed in this Court by the plaintiff against the defendant and that all of the matters and facts therein stated are true to the best of his knowledge and belief.

C. E. HOLGERSON.

Subscribed and sworn to before me this 23rd day of June, 1945, at Washington, D. C.

ANN McCANN,
Notary Public, D. C.

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Filed Jun 25 1945

**Supplemental Affidavit of C. E. Holgerson in Support of
Plaintiffs' Application for Temporary Restraining Order
and Preliminary Injunction.**

DISTRICT OF COLUMBIA, ss:

C. E. HOLGERSON of lawful age, first being duly sworn according to law, upon his oath states as follows: He makes this affidavit for the purpose of supplementing his original affidavit herein and of citing definite and specific instances of the discrimination referred to in paragraph 7 of his original affidavit and in that connection states that on the following dates the following named competitors of the plaintiff were permitted and allowed by the defendant to mail and defendant carried through the mails and delivered to the addressees at the addresses hereinafter set forth at the "book rate" of 3¢ per pound, plus 3% "work books" of the same kind and style as the "work books" published by plaintiff and described and referred to in affiant's original affidavit.

The names of such publishers, the dates of mailing and the names and addresses of the addressees being as follows:

16 Name and Address of Publisher	Date of Mailing	Name and Address of Addressee
Lyons & Carnahan 2500 Prairie Ave., Chicago, Ill.	April 4, 1945	Mrs. N. B. Humphrey Shirkmere Apartments Wichita, Kansas
American Book Co., 300 Pike Street Cincinnati, Ohio	April 4, 1945	"
The Macmillan Co., 2459 Prairie Ave. Chicago, Ill.	April 6, 1945	"
Charles E. Merrill Company 373 Fourth Avenue New York, N. Y.	April 4, 1945	"
Ginn and Company 2301 Prairie Ave. Chicago, Ill.	April 3, 1945	"
Benj. H. Sanborn & Co., 221 E. 20th St., Chicago, Ill.	April 10, 1945	"
Webster Publishing Co. 1808 Washington St. St. Louis, Mo.	April 4, 1945	"
Ginn and Company, 2301 Prairie Ave. Chicago, Ill.	Aug. 24, 1944	Miss Evelyn De Maud Wichita, Kansas
American Book Co. 300 Pike Street Cincinnati, Ohio	Aug. 17, 1944	David S. Edwards Madisonville, Ky.
Webster Publishing Co. 1808 Washington Ave. St. Louis, Mo.	Aug. 22, 1944	C. W. Park Wichita, Kansas
Laidlaw Bros. 328 So. Jefferson St. Chicago, Ill.	Aug. 22, 1944	C. W. Park Wichita, Kansas

16	Name and Address of Publisher	Date of Mailing	Name and Address of Addressee
	Laidlaw Bros. 328 So. Jefferson St. Chicago, Ill.	Aug. 21, 1944	Evelyn De Maud Wichita, Kansas
17	Benj. H. Sanborn & Co., 221 E. 20th St., Chicago, Ill.	June 5, 1945	Evelyn De Maud Wichita, Kansas
	The Macmillan Company 2459 Prairie Ave. Chicago, Ill.	Aug. 21, 1944	C. W. Park Wichita, Kansas

C. E. HOLGERSON

Subscribed and sworn to before me this 23 day of June, 1945.

ANX McCANN,
Notary Public, D. C.

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Filed Aug 6 1945

Affidavit in Opposition to Motion for Preliminary Injunction

DISTRICT OF COLUMBIA, ss:

NELSON B. WENTZEL, of lawful age, first being sworn according to law, upon his oath states as follows:

1. He is a resident of the District of Columbia and is the Deputy Third Assistant Postmaster General and is authorized to and does make this affidavit for and on behalf of the defendant in the above entitled cause.

2. That he has supervision of the classification of mail matter under the Act of June 30, 1942 (39 U. S. C. A., Section 293 (a)) as amended; that he has read the affidavit and the supplemental affidavit of C. E. Holgerson in support of applications for temporary restraining order and preliminary injunction which were filed in the above entitled action, and states as follows in answer thereto:

3. That the defendant is charged by law with the duty of determining the proper classification of mail matter in accordance with the classes as prescribed by Congress and in applying to such classification the rate of postage as applicable by law thereto; that the defendant has determined that the publications listed in paragraph 3 of the affidavit of C. E. Holgerson are not "books" within
 19 the meaning of the said Act of June 30, 1942, and the regulations adopted pursuant thereto; that none of the said publications has been knowingly or will be knowingly accorded, or directed to be accorded, the "book rate" prescribed by the said Act of June 30, 1942, and the defendant unless enjoined by the Court will continue to refuse to accept and transmit in the United States mail at the "book rate" prescribed by the said Act, the publications listed in paragraph 3 of the affidavit of C. E. Holgerson.

4. That the publications listed in paragraph 3 of the affidavit of C. E. Holgerson are not permanently bound and the defendant has not changed the classification thereof; that the defendant has never accorded, or directed to be accorded, at the post offices in Wichita, Kansas, Columbus, Ohio, and Atlanta, Georgia, the "book rate" to the said publications: that on March 30, 1944, through the Third Assistant Postmaster General, the postmaster at Columbus, Ohio, was specifically directed not to accord the "book rate" to plaintiff's publications entitled "Essentials in English-Laboratory Method-Tests Book III," "Individual Corrective Exercises for Elementary School English-Book 6," and "Essentials in English-Laboratory Method-Book III"; that the defendant's action, as referred to herein, is not arbitrary, in violation of law, and without due process.

5. That the defendant has not accorded and is not according to competitors of plaintiff the privilege of having publications which are indetical in character, similar in content, and printed, bound and prepared in the same manner as the publications listed in paragraph 3 of the affidavit of

C. E. Holgerson, mailed at the "book rate" prescribed in the said Act of June 30, 1942, and the defendant has not discriminated in any manner in favor of competitors of the plaintiff and against the plaintiff.

6. Affiant further states that he has been advised that the allegations contained in the supplemental affidavit of C. E. Holgerson as to mailings of publications by alleged competitors of plaintiff are not material to the issues
20 involved in the above entitled action and, without admitting the materiality thereof, states that the facts are as follows: That the defendant has not permitted and allowed the alleged competitors of plaintiff the "book rate" for the same kind and style of publications as those referred to in paragraph 3 of the affidavit of C. E. Holgerson; that it is physically impossible for postmasters and subordinate employees of the postal establishment to inspect the contents of each and every parcel which is submitted for transmission through the United States mails; that affiant has investigated the mailings listed in the supplemental affidavit of C. E. Holgerson referred to in paragraph 2 hereof and has found that the parcels therein referred to were endorsed "books" and presented for mailing in violation of the said Act of June 30, 1942, and the regulations adopted pursuant thereto; that the said parcels were accepted for transmission in the United States mails at the "book rate" because of the endorsement "books" thereon and without knowledge on the part of postmasters and subordinate employees that the said parcels contained publications other than books within the meaning of the said Act of June 30, 1942, and the regulations adopted pursuant thereto; and that the postmasters at the places where such mailings took place, namely, Chicago, Illinois, Cincinnati, Ohio, St. Louis, Missouri, and New York, New York, have been advised of such mailings so that adequate precautions may be taken toward preventing a recurrence thereof.

7. Affiant further states that he has read the answer heretofore filed in the Court by the defendant and that all the matters and facts therein stated are true to the best of his knowledge and belief.

NELSON B. WENTZEL

Subscribed and sworn to before me this 3rd day of August, 1945.

SAUL J. MINDEL,
Notary Public, D. C.

My commission expires 12/14/48.

* * * * *

22 Filed Aug 9 1945

Answer to Amended Petition for Injunction

Comes now the defendant in the above entitled action and for his answer to the amended petition for injunction states as follows, to wit:

1. Defendant admits the allegations of fact contained in paragraph 1 of the amended petition for injunction.

2. Defendant admits the allegations of fact contained in paragraph 2 of the amended petition for injunction.

3. Defendant has no knowledge sufficient to form a belief as to the allegations of fact contained in paragraph 3 of the amended petition for injunction.

4. Defendant has no knowledge sufficient to form a belief as to the allegations of fact contained in paragraph 4 of the amended petition for injunction.

5. Defendant has no knowledge sufficient to form a belief as to the allegations of fact contained in paragraph 5 of the amended petition for injunction.

6. Defendant has no knowledge sufficient to form a belief as to the allegations of fact contained in paragraph 6 of

the amended petition for injunction, except defendant denies that the publications therein described are "books" within the meaning of the Act of June 30, 1942 (U. S. C. Title 39, Sec. 293 (a)).

23 7. Defendant denies that the publications referred to in paragraph 7 of the amended petition for injunction are "books" within the meaning of the Act of June 30, 1942, *supra*.

8. Defendant denies that the publications referred to in paragraph 8 of the amended petition for injunction are "books" within the meaning of the Act of June 30, 1942, *supra*, and defendant further denies that plaintiff is entitled to have said publications carried through the mails at the rate of postage prescribed by said Act, as amended by the Act of February 25, 1944 (C63, Title IV, 58 Stat. 69).

9. Defendant generally denies all of the pertinent and material allegations of fact contained in paragraph 9 of the amended petition for injunction and specifically denies that he has ever knowingly accepted or received, or caused to be accepted or received, for transmission in the mails any of the publications described in paragraph 6 of the amended petition for injunction at the "book rate" prescribed by the Act of June 30, 1942, *supra*.

10. Defendant admits that subsequent to the approval of the Act of June 30, 1942, *supra*, the defendant on July 1, 1942, promulgated the amendment to paragraph 3 of Section 561 and to paragraphs 5 and 6 of Section 572 of the Postal Laws and Regulations, as set forth in paragraph 10 of the amended petition for injunction, but defendant avers that on October 9, 1944, by duly promulgated Order No. 26165, defendant further amended paragraph 6 of Section 572 of the Postal Laws and Regulations, to read as follows:

"6. A book within the contemplation of paragraph 5, shall be a volume permanently bound in cloth or paper

having 24 or more pages, of which at least 22 are printed, and with the exception of text books containing incidental spaces for students' notations, shall not contain ruled or blank pages intended for records or memoranda purposes."

11. Defendant denies that either during the period from July 1, 1942, to March 30, 1944, or during any other
24 period since the passage of the Act of June 30, 1942, supra, defendant ever knowingly accorded, or directed to be accorded, at the post offices in Wichita, Kansas, Columbus, Ohio, Atlanta, Georgia, or at any other United States post offices, the "book rate" prescribed by said Act, to the publications listed in paragraph 6 of the amended petition for injunction.

Answering further, defendant admits that on March 30, 1944, through the Third Assistant Postmaster General, the postmaster at Columbus, Ohio, was specifically directed not to accord said rate to plaintiff's publications entitled "Essentials In English Laboratory Method-Tests Book III," Individual Corrective Exercises For Elementary School English-Book 6," and "Essentials In English Laboratory Method-Book III."

Answering further, defendant admits that none of the publications listed in paragraph 6 of the amended petition for injunction have been knowingly or will be knowingly accorded said "book rate."

Answering further, defendant denies every other allegation in paragraph 11 of the amended petition for injunction.

12. Defendant has no knowledge sufficient to form a belief as to the allegations of fact contained in paragraph 12 of the amended petition for injunction, except that defendant denies that the defendant or his predecessors in office have unlawfully, without notice, and without hearing, or giving plaintiff the opportunity to be heard, changed the postal classification of the publications listed in par-

agraph 6 of the amended petition for injunction, and denies that his actions referred to therein were or are arbitrary.

13. Defendant denies the allegations of fact contained in paragraph 13 of the amended petition for injunction.

14. Defendant has no knowledge sufficient to form a belief as to the allegations of paragraph 14 of the amended petition for injunction.

15. Defendant denies the allegations contained in paragraph 15 of the amended petition for injunction, except that defendant admits that unless enjoined by the court he will continue to refuse to accept and transmit in the United States mails at the "book rate" accorded by the Act of June 30, 1942, supra, the publications of plaintiff mentioned in paragraph 6 of the amended petition for injunction.

Further answering, defendant says that he is charged by law with the duty of determining the proper classification of mail matter in accordance with the classes as prescribed by Congress and in applying to such classification the rate of postage as applicable by law thereto; that, pursuant to the express directions of the Act of June 30, 1942, supra, defendant has duly issued and promulgated a regulation as paragraph 6 of Section 572 of the Postal Laws and Regulations (set forth in paragraph 10 hereof), in which he states that "a book within the contemplation of" the said statute "shall be a volume permanently bound * * *"; that defendant has determined that the publications referred to in the amended petition for injunction are not "books" within the meaning of the said Act of June 30, 1942, and are not entitled to be mailed at the rate prescribed in said Act, as amended by the Act of February 25, 1944, and that said publications are subject to the parcel post rate.

Wherefore, having fully answered the allegations of fact contained in the amended petition for injunction, defend-

ant prays that the amended petition for injunction be dismissed and that the temporary restraining order heretofore issued be dissolved.

/s/ EDWARD M. CURRAN,
United States Attorney

/s/ JOHN W. FIDELLY,
*Assistant United States
Attorney*

/s/ PAUL MEININGER,
*Post Office Department
Attorneys for Defendant.*

Service of Copy of the foregoing answer acknowledged this 9th day of August, 1945.

A. R. WILLIAMS
per HELEN M. ROGERS
Attorney for Plaintiff
Investment Building
Washington, D. C.

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Filed Nov 30 1945

Stipulation

It is hereby stipulated and agreed by and between the parties to the above-entitled action as follows:

I. Exhibits 1, 2, 3, 4, 5, and 6 are the publications which the plaintiff contends are, and described in its petition as "work books" and which are referred to in the affidavit of C. E. Holgerson, dated June 23, 1945, and filed in this cause on the 25th day of June, 1945, and described in paragraph 6 of the amended petition as Nos. 1, 2, 3, 4, 5, and 6;

II. That Exhibit 7 is a true and correct transcript of proceedings had in hearings before the Committee of the House of Representatives on the Post Office and Post Roads in connection with bills to provide for permanent postage rate on books, which resulted in the passage of the Act entitled

"An Act to provide for a permanent postage rate of 3 cents a pound on books," (39 U.S.C.A., Sec. 293a);

27 III. That Exhibit 8 is a true and correct copy of the report of the Committee of the House of Representatives on the Post Office and Post Roads submitted June 15, 1942, relative to Senate Bill 337;

IV. That Exhibit 9(a), 9(b), and 9(c) are pages 5493, 94, and 95 of the Congressional Record of proceedings had in the House of Representatives on June 17, 1942, relative to the report of the Committee on the Post Office and Post Roads, heretofore referred to in Exhibit 8, and proceedings had in the House on said date relative to establishment of permanent postage rate on books;

V. That Exhibit 10 is a true and correct copy of Conference Report to the House of Representatives under date of June 22, 1942, relative to Senate Bill 337, signed by Managers on the part of the House and the Senate, together with a statement of the Managers on the part of the House;

VI. That Exhibit 11 is page 5630 of the Congressional Record, concerning proceedings had in the House of Representatives on June 22, 1942, concerning Conference Report and statement of the House Managers relative to Senate Bill 337;

VII. That Exhibit 12 is page 5673 of the Congressional Record, concerning proceedings had in the House of Representatives on June 23, 1942, wherein the Conference Report above referred to was approved by the House of Representatives;

VIII. That Exhibit 13 is page 5740 of the Congressional Record, concerning proceedings had in the Senate on June 25, 1942, wherein the Conference Report above referred to was agreed to by the Senate;

28 IX. That following the above proceedings a bill was passed by the House and Senate on June 30, 1942, and in its final form was in words and figures as follows:

“The postage rate on books consisting wholly of reading matter or reading matter with incidental blank spaces for students’ notations and containing no advertising matter other than incidental announcements of books, when mailed under such regulations as the Post Master General may prescribe, shall be 3 cents per pound or fraction thereof, irrespective of the postal zone of destination thereof: Provided, That this Act shall not affect the rates of postage on books mailed by or to libraries and organizations as prescribed by the Act of February 28, 1925, as amended.”

X. It is understood that the defendant objects to the admissibility of Exhibits 7 to and including 13, on the ground that the language of the Act of June 30, 1942, and the regulations adopted thereunder is clear and unambiguous, and that the Court may not properly resort to extrinsic aids in applying the statute; and that, subject to the objection stated herein, the said exhibits may be considered as evidence;

XI. That Exhibit 14 is a true and correct copy of the following:

a. Presidential proclamation dated October 31, 1938, relative to postage rate on books.

b. Amendment to the Postal Laws and Regulations promulgated October 31, 1938.

c. Statement of S. W. Purdum, Acting Postmaster General, under date of October 31, 1938.

d. Statement of Roy M. North, Acting Third Assistant Postmaster General, under date of October 31, 1938;

XII. That Exhibit 15 is a true and correct copy of a statement of information regarding the new postage rate on books issued November 17, 1938, by Ramsey S. Black, Third Assistant Postmaster General;

XIII. That Exhibit 16 is a true and correct copy of a statement issued on December 21, 1938, by Ramsey S. Black, Third Assistant Postmaster General, concerning “further information regarding the new postage rate on book”;

XIV. That the original executive order of the President (Exhibit 14) was extended from time to time until the effective date of the Act of June 30, 1942, and above instructions and postal regulations concerning postage rate on books remained in force and effect until the effective date of said Act;

XV. That Exhibit 17 is a true and correct copy of Order No. 18100, amending the Postal Laws and Regulations concerning postage rate on books, issued June 30, 1942, by the Postmaster General.

XVI. That Exhibit 18 is a true and correct copy of instructions of Third Assistant Postmaster General which appeared in The Postal Bulletin of July 10, 1942, relative to mailing of books at postage rate of 3 cents a pound;

XVII. That Exhibit 19 is a true and correct copy of Order of the Postmaster General dated July 17, 1944, issued pursuant to Act of February 25, 1944, amending the Act of June 30, 1942;

XVIII. That Exhibit 20 is a true and correct copy of order issued October 9, 1944, by the Postmaster General, amending paragraph 6 of section 572, Postal Laws and Regulations of 1940, as amended, said order having been printed in The Postal Bulletin of October 10, 1944;

XIX. That the copies of letters contained in Exhibit 21 are true and correct copies of the originals thereof;

XX. That copies of letters contained in Exhibit 22 are true and correct copies of the originals thereof;

XXI. That Exhibit No. 23 is a true and correct transcript of the sworn testimony of C. E. Holgerson, Robert E. Lambert, George E. Carr, Newton P. Blatt, and R. Merle Eyman and Nelson B. Wentzel, given August 29, 1944, in the District Court of the United States for the Southern District of Ohio, Eastern Division, during the trial of the case of the McCormick-Mathers Company, a corporation, plaintiff, versus Nate McCoy, Postmaster at Columbus, Ohio, defendant, No. 948; and that said transcript may be

received in evidence herein, subject to the objections made at the time of said trial, as show in said transcript; it being further understood that the defendant now objects to any portion of the testimony contained in said transcript relative to the legislative history of the Book Rate Postage Act, on the grounds heretofore set forth in paragraph X of this stipulation;

XXII. That, so far as relevant and material, the Court may consider as evidence in this case the original and supplemental affidavits of C. E. Holgerson, dated June 23, 1945, and filed in this cause on June 25, 1945, and the affidavit of Nelson B. Wentzel, dated August 3, 1945, and filed in this cause on August 6, 1945;

31 XXIII. That the publications marked Nos. 24 to 34, inclusive, were contained in some of the shipments referred to in the supplemental affidavit of C. E. Holgerson, dated June 23, 1945, and filed in this cause on June 25, 1945, and are offered by the plaintiff merely for the purpose of showing that said exhibits contain perforated pages and blank spaces for students' notations; that, however, the defendant objects to the admissibility in evidence of said exhibits on the ground that they are irrelevant and immaterial and introduce collateral issues which should not properly be considered in this cause;

XXIV. That the copies of letters contained in Exhibit 35 are true and correct copies of the originals thereof;

XXV. That Exhibit 36 is identical with Exhibit 8 referred to in the transcript of the testimony of Robert E. Lambert in paragraph No. XXI; and Exhibit 37 is identical with Exhibit No. 9 referred to in said transcript of testimony of Robert E. Lambert;

XXVI. It is further understood and agreed that the defendant herein will, on or before August 9th, file an answer to plaintiff's first amended petition, as amended on August 6th.

XXVII. The parties further stipulate and agree that the complainant will be damaged in a sum in excess of \$3,000

by the refusal of the defendant to accept at the book rate the publications referred to in paragraph 6 of the first amended petition, as amended.

XXVIII. That the deposition of L. W. Brooks taken on behalf of the plaintiff at Topeka, Kansas, on the 30th day of March, 1945, and copy of which is herewith submitted and marked Exhibit No. 38, be admitted in evidence 32 subject to objections made by the defendant at the time of taking thereof, as appear on page 6 of said deposition, and subject to the further objection that the testimony contained therein relative to work books is incompetent, immaterial, and irrelevant for the reasons stated in the objection made to the testimony of George E. Carr, Newton P. Blatt, and R. Merle Eyman, as set forth in Exhibit No. 23.

XXIX. The parties agree that this cause be and is hereby submitted to the Court for final determination under the foregoing stipulation of facts, in witness whereof the parties have hereunto set their hands this 7th day of August, 1945.

A. REA WILLIAMS

THOS. E. DEACY

Attorneys for Plaintiff.

EDWARD M. CURRAN

U. S. Atty.

PAUL MEININGER

Attorney for Defendant.

* * * * *

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Filed Nov 30 1945

Memorandum Opinion

Petition dismissed.

The duty imposed upon the Postmaster General under the given circumstances is not merely ministerial but involves a certain amount of discretion. It is hornbook law that the exercise of such will not be interfered with by the courts unless plainly wrong.

"It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definite action."

Gray v. Powell, 314 U. S. 402, 412

The legislative history of the act is unimportant, the language being plain and unambiguous. There is no need, therefore, for construction and consequently no need of anything to give it aid. Kuehner v. Irving Trust Co., 299 U. S. 445, 449.

Again, the object of all construction is to determine legislative intent. If Congress intended anything *other* than what it categorically stated in the statute it would have said so. The language is clear, therefore conclusive. Osaka Chosen Line v. U. S., 300 U. S. 98, 101.

Cases cited by the plaintiff are either not apposite or distinguishable.

Counsel will prepare proper order.

MATTHEW F. MCGUIRE

Justice

November 30, 1945

* * * * *

49

Filed Dec 6—1945

Order

Upon consideration of the petition, the answer, and the stipulation of facts in the above entitled cause and the Court being fully advised in the premises, it is by this Court this 6th day of December, 1945,

Adjudged, Ordered and Decreed, as follows:

1. That the petition be, and the same hereby is, dismissed on the merits.

MATTHEW F. MCGUIRE

Justice

* * * * *

II.

EXCERPTS FROM TESTIMONY AND EXHIBITS.**Testimony (Exhibit No. 23)**

1259 **C. E. Holgerson** called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Deacy.

Q. Will you give your name, please, to the Court?
A. C. E. Holgerson.

Q. Where do you live? A. Wichita, Kansas.

Q. What is your business or occupation? A. School book publishing.

Q. What company are you connected with? A. The McCormick-Mathers Publishing Company.

Q. That is the plaintiff in this case? A. That is right.

Q. What is your connection with that concern? A. Assistant general manager.

Q. Is the McCormick-Mather's Publishing Company a corporation organized under the law of the State of Kansas?
A. That is right.

Q. Where does it maintain its principal office? A. 1501 East Douglas, Wichita, Kansas.

Q. Does that company maintain a bank office or place of business in the city of Columbus, Ohio? A. It does.

Q. What is the purpose of the office maintained at Columbus? A. For distribution.

Q. The plaintiff in this case is a publishing concern that publishes school textbooks commonly called work books?

A. That is right.

1260 Q. Out of the office located at Columbus do you service any particular territory located in the United States? A. We serve that territory including Indiana and Kentucky, Virginia and West Virginia, and all the states northeast of those.

Q. All the states east of Illinois and north—A. Of Kentucky and West Virginia.

Q. So that it covers the territory of the states located in the northeast part of the United States? A. That is correct.

Q. During an average year about how many orders do you fill from the Columbus office? A. Approximately 19,000.

Q. And about how many different pieces of matter do you mail from the Columbus office? A. Approximately 900,000. Were you asking of me the number of volumes?

Q. Yes. A. That is right.

Q. Does your company publish anything except work books? A. Work books and some textbooks, but primarily we are engaged in the work books.

Q. What is a work book? A. A work book is a book that consists of textual material and drill exercises. The page may or may not be perforated. There are blank spaces for students' notes.

Q. Has the work book been a more or less recent development in the science of teaching? A. The work book was developed to meet a definite need in the educational institution of our public schools. They were developed by classroom teachers. The fundamentals are taught by work books, and they employ the principle that is recognized as one of the best ways of teaching, that is learning by doing.

Q. What is the purpose of the blank spaces which appear in the work book? A. They are put there, the blank spaces, to receive the answers. If you are teaching, say, for example, grammar, you are not interested in teaching penmanship. It saves the teacher's time and the student's time, and that makes a teacher a specialist.

Q. To whom do you sell your publications? A. We sell them to teachers, students, boards of education, county, and some cases states and foreign countries.

Q. Has the development of the work book been more or less a modern thing? A. The work book has been developed in the past twenty years.

Q. Are you able to give to His Honor a general idea as to what portion of the total school students in the United States use work books? A. There are more than twenty-five percent, there are approximately 32,000,000 students enrolled in the public and private schools, that is below the college level. More than twenty-five percent use at least one work book. A given student may use, for example, in the field of grammar or arithmetic or science.

Q. What is the comparison in practice to the students between the work book and the ordinary standard textbook?

A. I have a couple of examples. May I get them?

Q. Yes. A. Here are two books. One is called "Planning the Hand Book." That book sells in the paper edition for eighteen cents, and the same book, identically, printed off the same plates in a case binding sells for forty-eight cents.

Q. Has the term "work book" in recent years had 1262 a well-defined meaning in this country? A. Among educators I would say that the work book has had a common understanding as to what you have in mind. It is a tool, and to have a tool just like a man in an airplane plant uses a lathe which is essential, so the teacher has the proper tools for the learning process.

Q. And in 1941 and 1942 was it a common characteristic of all work books published in this country that all or portions of pages of the book are perforated? A. In the matter of perforation, our policy has not changed. We are using perforations, we were using them ever since we entered the work book business. I have many samples that I would be glad to leave with the Court and explain. Competitors of ours are using them too.

Q. The question was whether in the years 1941 and 1942 perforations were characteristic and common to all work books. A. I would say that they would be common to the majority of work books.

Q. And was it a characteristic common to the majority of work books that they had blank places for students to make notations? A. That is right.

Q. Does your company have on hand at this time at this office in Columbus any considerable number of work books which are printed up with perforated pages? A. We would have at this time approximately 600,000 copies.

Q. At Columbus? A. At Columbus.

Q. And during what period of the year do you have occasion to deliver the majority of your publications?
1263 A. During the months of September and October we will deliver sixty-seven percent of our annual sales.

Q. Now, has it been your custom and practice to make deliveries through the United States mails? A. It has.

Q. I will ask you to state whether or not the defendant in this case accorded to your company or the post-office department, I will say, of Columbus, Ohio, accorded to your company until recently the right and privilege of sending your publications and the publications described in the petition in this case through the United States mail at the book rate of three cents per pound? A. We were permitted to ship all of these exhibits with the exception of the test "Twelve Hour."

Q. Was that permission granted after July 1, 1942? A. It was.

Q. That was after the passage by Congress of the so-called "Book Bill"? A. That is right.

Q. You were permitted to send these publications referred to in the petition through the mails at the book rate of three cents per pound up until a few weeks ago? A. That is right, until the new revenue act was passed where they added three percent.

Q. Then you continued to send through at three cents per pound plus three percent? A. That is right.

Q. Will you explain to His Honor in a general way the manner in which the work book is customarily and commonly used in the schoolroom? A. The principle of the work book is that each student must have a book. He has the pride of possession for one thing, and then the work book was developed by classroom teachers. It is not a

theoretical type of material that has been developed,
1264 but actually was developed by class-room work.

Mr. Hassell: Please speak a little louder.

The Witness: The student ordinarily is tested to find out his relative strength to the rest of the class. I would call that survey testing. Then the teacher knows which student is weak, say in the case of verbs, and during the lessons that follow in the book she can help little Johnny with his difficulties. The other students are taken care of in a like manner. The student with a high I.Q. is not penalized because in our book each student does not have to be on the same lesson each day, rushing one and holding one back. That type of education and that type of planning by our company has brought our books into wide national use. Even today where you have a tremendous teacher turnover and salesmen being unable to cover the territory, our volume of business has continued to increase. The acceptance of work books has been very encouraging. We have made our contribution through education.

Q. Mr. Holgerson, I want you to explain to His Honor why your company relative to the books described in the petition and other work books published by it, why the work books publishers generally have included perforated pages in the books. A. Well, it facilitates grading; because they are perforated it does not mean that they necessarily have to be used as detachable sheets. There are in there as a matter of convenience. If this given teacher wants to use it one way she may. If another teacher wants to use it another way she may, and at the same time folding the page back and forth, or turning it will not permit

1265 these pages to get out. They have to actually be torn out to get out. If the teacher takes a knife and cuts the sheets out, that would add to the amount of time that it would take, and it would also deform the book in general.

Q. As I understand it, the general use of the book is such that some teachers prefer to have the student remove the

perforated pages after he has answered the questions, and some of them prefer that they leave them in the book? A. That is right.

Q. Will you explain to His Honor, please, whether or not the books referred to in the petition in this case heretofore described in the stipulation filed by the parties are permanently bound books? A. They are permanently bound books.

Q. When the books are delivered to the post office are they in the final form in which they are delivered to the customer? A. They are.

Q. Will you describe to His Honor, please, Mr. Holger-son, the manner in which these books in question here are printed and bound? A. The manufacturing process, you mean?

Q. Yes, in a brief general way. A. Well, Your Honor, the sheets of paper are printed by presses, and along at the edge of the plate for a given page you may put a perforation. In other words, we are doing the perforating and printing at the same time. Now, the books in general are printed in what we call thirty-two page signatures.

Mr. Hassell: I did not get the last.

1266 The Witness: Signatures. If you had a book of 93 pages it would be three and thirty-twos. Those are put over a stitching machine together with the cover and they are permanently bound, the side stitching, and by the same process—the word saddle-stitch, by the same process is used in the saddle-stitch as in the side stitch.

Q. After the printing is completed then the printed pages are bound into a volume or book form? A. Yes.

Q. And a paper cover placed thereon? A. That is correct.

Q. As a part of the binding technique or operation are the pages stitched together with wire? A. They are stitched together with wire.

Q. And then the cover is later placed over that? A. There are two processes; in the case of a saddle-stitch book the cover is stitched together with the different sec-

tions or signatures. The side book, the signatures are stapled together, and the cover glued.

Q. Is that the same method that is commonly used in the binding of books in this country? A. It may be varied. They use the linen string, twine, in the case of bound books, and some of them are stapled with wire stitches.

Q. Is it one of the general binding practices that is followed in this country? A. It is.

Q. In binding the books into permanent bindings? A. It is.

Q. Does the perforation of the page have anything to do with the binding of the book? A. No.

Q. Does the binding of the book have anything to do with the perforation of the page? A. No.

Q. In the event the purchaser of a book, or student, or teacher should elect to remove one of the perforated pages from the book, does that in any wise affect the binding as a permanent thing? A. No.

Q. Mr. Holgerson, did you appear as a witness before the House Committee on Post Offices and Post Roads, Committee of the House of Representatives, at the hearing held on the so-called Book Bill in July, 1941? A. I did.

Q. Did you produce for the benefit of that committee the books referred to in plaintiff's petition in this cause? A. I presented at that hearing Essentials in English-Laboratory Method Book II, New Edition, and New Plain Way English Exercise Self-Correcting Laboratory Plan, Book III, the latter book is entirely perforated, and was at that time, and the former book had approximately twenty-four pages perforated, I believe both of those books were represented in that hearing.

Q. And were those books before the Committee at the time consideration was given at the hearing? A. Every member had copies and they were the basis of many questions.

Q. Now, I want to call your attention to one of the books referred to in plaintiff's petition, known as Essentials in

English-Laboratory Method Test Book Form No. 12 R, which has been marked as Exhibit No. 5, and will ask you to state whether or not this textbook is used by the student and the teacher in connection with the other volumes which have been offered in evidence here, and described in the petition. A. It is.

1268 Q. Is this Exhibit No. 5 supplied to the student and the teacher free of charge? A. It is.

Cross Examination

By Mr. Hassell:

Q. Mr. Holgerson, you say that Exhibit 5, Form No. 12 R, Essentials of English-Laboratory Method, is supplied free of charge to the students or teacher? A. It is.

Q. What do you mean by that, that you give them to anybody who asks for them? A. When you mention "teacher and student" I presume you mean that they were the people who used our books.

Q. Any teacher or student can simply ask you for this and you will give it to them free? A. No.

Q. They have to buy some other book to get it, is that correct? A. It is supplied with the "Essentials in English-Laboratory Method" book.

Q. You figure in the cost of this, the price that you charge for that book, do you not? A. I would have to refer to our cost to answer that. Naturally we have to have a profit.

Q. It costs you something to produce it, doesn't it? A. Sure.

Q. Mr. Holgerson, you stated, I believe, that two of these books, I did not get the exhibit numbers, were presented to the House Post Office Committee when the hearings on the bill which finally resulted in the Act of June 30, 1942, being passed; what were those books? A. Plain Way
1269 English Exercises and Book III of Essentials in English-Laboratory Method, and Book II.

Q. You say those have perforated pages? A. They have.

Q. Are all the pages perforated? A. As I explained a

moment ago, Plain English Exercises, all the books are perforated, and in the case of Essentials in English-Laboratory Method approximately twenty-four pages are perforated.

Q. Can you call the Court's attention to the particular page or pages in the records of the hearing of the House Committee wherein the fact that these books or pamphlets containing perforated pages was pointed out to the House Post Office Committee? A. That would be very difficult for me to remember the exact page of the hearing readily and exact quotation.

Q. Do you testify to the fact that these books or pamphlets that had perforated pages were brought to the attention of the House Committee in connection with your testimony? A. The books speak for themselves that were in evidence.

Q. I understand that, but did you in presenting them call attention to the fact that they had perforated pages? A. On direct examination from Mr. Flannery of Pennsylvania, Deputy Third Assistant Postmaster General Roy North was asked if the Plain Way English Exercises, Book III, would be accepted by the Post Office as a book if the bill included the words "incidental blank spaces" and Mr. North replied that it would.

Q. Mr. Holgerson, you have answered my question.
1270 Did you call the Committee's attention to the fact that some of these pages were perforated or was that discussed by you with the Committee in your testimony? A. The evidence is there. They were considering this specific book.

Q. Was the perforation part of it discussed? A. I considered it the best evidence that the Committee was using these books, handling the books, and talking about them. That is what the Committee had in mind, I am sure.

Q. I see. Referring to Exhibit 5 in evidence, that is the Essentials in English-Laboratory Method Test Book, New Edition, Form No. 12 R, it is a fact, is it not, that all of the

pages including the front cover and the back pages of this book are perforated, isn't that a fact? A. I would have to examine it. (After examining same:) They are.

Q. I believe you testified that when these perforated pages are removed the binding of the book is not affected. Now, the Court will understand that if all the perforated pages in this so-called book is removed you would have a little matter with no printed matter on there, containing the two staples, being a little less than half an inch wide and the length of the book, that would be your book after you removed the pages? A. We cooperated with the war effort by cutting down on the staples.

Q. Will you answer that question, that would be the book? A. Could I have the question again?

(Question read.)

A. You are referring to Exhibit 5?

Q. Exhibit 5, that is what I am talking about.

Mr. Deacy: The question merely has reference to 1271 this one exhibit?

The Witness: That is right.

Q. So that would be your book after you removed the pages, is that right? A. Yes, if they were removed.

Q. Mr. Holgerson, you will notice that there are no page numbers on the pages in this so-called book, have you noticed that? It is not paged, or numbered from one consecutively on through to the twenty-four pages in the so-called book. A. The paging in that is taken care of by the test numbers.

Q. There are no actual page numbers on this so-called book?

Mr. Deacy: I think counsel should identify the book.

Q. Exhibit No. 5, is that correct? A. The paging is taken care of by the test numbers. If you look on the top of the page you will see Test No. 1 and Test 2. Look at the top of the page at the beginning of each test.

Q. Student's name—and we find that matter repeated with respect to the so-called tests throughout this so-called

book. In your dealing with books is it customary for the owner of the book to write his name on every page or every other page of the book? A. He might.

Q. He might, but it is not customary, is it? A. These are used in schools.

Q. These are examination or test papers used in schools, aren't they? A. They are tests used in connection with the Essentials in English-Laboratory Method Book II.

Q. Test papers used in schools? A. Test books 1272. used in books.

Q. Each one of these are test books, or the whole thing put together are test books? A. Exhibit 5.

Q. At the bottom of each and every page, each and every sheet on the page states, and each and every page, and I call your attention to the fact that it is written "Copyright 1939 The McCormick-Mathers Publishing Co."—you copyright every individual page of this particular so-called book, do you? A. All the materials covered by copyright issued.

Q. Isn't it customary in copyrighting a book to put the notice of copyright in the first fly leaf of the book, the first part of the book? A. Not all the time, no.

Q. It is ordinarily customary, isn't it, with respect to books as generally accepted? A. Ours are books.

Q. Counsel asked you on direct examination whether or not you published anything but work books. You stated that you published some textbooks, isn't it a fact that you publish text sheets that you send out with your work books or test books at times, sheets containing such matter somewhat similar to that we have in Exhibit 5, individual sheets? A. Exhibit 5 has twenty-four pages.

Q. I am speaking of the sheets, the tests in this exhibit. A. You mean just one sheet of paper?

Q. One sheet of paper, or a folder of two sheets. A. We do have a test prepared for college entrance, called Forms D and E, those are the only exception.

Q. As a matter of fact, hasn't your company had its attention called to the fact that packages mailed at the

1273 post office labeled "books" or marked "books" on the outside contain such loose sheets or test sheets which call for a higher rate of postage? A. Yes, we have.

Q. So it is a fact, is it not, that these tests can be published on separate sheets or folders? A. Why, no, we have to put them out in that form to take care of that teaching job.

Q. Will you explain to the Court why it is necessary for you to put these staples in, why wouldn't you accomplish the same purpose by putting these individual tests out as folders or sheets? A. I do not quite get your question.

(Question read.)

Mr. Deacy: Is the question directed to Exhibit No. 5?

Mr. Hassell: Yes.

The Witness: The question is why these could not be put out in individual sheets?

Q. Yes. A. It is so tied into the entire job that we hope can be accomplished through the Essentials book that you are referring to, that is just like one page of that is to a page in the book that would not accomplish the teaching job that the educators are wanting.

Q. You referred in your testimony, Mr. Holgerson, to two books, a handbook that sold for eighteen cents, and the same book bound for forty-eight cents, I believe you have them before you there? A. Yes.

Q. Are these work books? A. Most educators refer to this book binding, this handbook as being a work book.

Q. Does that have perforated pages? A. No.

1274 Q. Does that have your copyright on each page, on the bottom of each sheet? A. No, it does not.

Q. Does it have a space at the top of the page, or every other page, for the owner of the book, the name of the teacher, the grade, date, and so forth? A. No.

Q. It does not? A. No.

Q. Now, Mr. Holgerson, you testified that until recently the book rate was accorded to you on perforated paged

books by the post office at Columbus, did you not? A. That is right.

Q. How was that done, did you mail the packages and label them "books", and offer them for mailing at the Columbus office? A. That is right.

Q. You did not call the postmaster's attention to the fact that these packages contained perforated paged books or pamphlets, did you? A. These had been accepted by the department.

Q. I am asking you a question, Mr. Holgerson. A. No, we do not talk everything over.

Q. You labeled the package, you marked it "books", and you put it in the post office, and you did not call the clerk's attention to the fact that it contained perforated paged pamphlets? A. Nobody had objected to perforations.

Q. That is what you had reference to when you stated this book rate had been accorded to your company for these books during this time that you referred to in your direct examination respecting this matter? A. In my capacity with the company I would know what the Postmaster at Wichita and at Atlanta, or the Postmaster at Washington had done. They had always indicated and samples had been delivered to them, and they were accepted.

Q. In connection with that statement, I call your attention to a letter in evidence here as Exhibit I, being a letter dated September 22, 1942, directed to the post office in Wichita, Kansas, by the Third Assistant Postmaster General. Was that matter brought to the attention of your company? A. Regarding the test No. 2 for Essentials in English, and so forth, when this instruction came out from the Third Assistant Postmaster General we discontinued sending tests out at the book rate. However, a few mistakes were made and our attention was called to them, and we complied.

Q. Your answer is that your attention was called to this letter of September 22, 1942, to this ruling of the Department, is that correct? A. That is at Wichita, Kansas?

Q. Yes. A. Yes.

Q. In this letter the Third Assistant Postmaster General told the Postmaster at Wichita, Kansas, with respect to this book that this publication consisted in its entirety of perforated pages with blank spaces at the head of each test sheet for the name of the student, instructor, and so forth, showing that the pages are designed for removal. "Such matter is not entitled to the book rate, but may be inclosed with books mailed at the postage rate of three cents a pound prescribed by paragraphs 5 and 6, amended Section 572, P. L. and R., class rate of one and one-half cents for each two ounces in addition to postage at three cents a pound on

the books themselves." You testified, Mr. Holger-
1276 son, with respect to these work books in connection with the manner that they are customarily and commonly used in schools that each student, that he has a "pride of possession," a pride of possession in what is left to him after the pages are removed from the so-called book, is that what you had reference to? A. I had reference to the fact that the student had a book of his own.

Q. You say the perforated pages facilitated grading, how do they facilitate grading? A. If the teacher wishes to have them detached, she may have them detached, but if she does not they use them in their entirety.

Q. How do they facilitate grading, if they were not detached? A. If you are handling a class of 50 students you would understand.

Q. So the perforated pages assist the grading by the teacher if the pages are removed? A. They can pass them from one student to the other.

Q. You testified that the perforated pages facilitated grading. A. Grading by either the teacher or student.

Q. What has perforated pages got to do with the grading? A. A teacher may go along and let the student do his work in the book for a long period of time, and then say she would like to have them detached.

Redirect Examination

By Mr. Deacy:

Q. Just another question or two, Mr. Holgerson. Counsel for the defendant made reference to the letter of the Third Assistant Postmaster General of September 1277 22, 1942. Just to clear the situation up I will ask you if that letter did not apply only to textbooks and did not apply to the books described as Exhibits 1, 2, 3, 4, and 6? A. That is right.

Q. And after the receipt of that letter did the Post Office Department here at Columbus, and Wichita and Atlanta, continue to carry through the mails at the book rate Exhibits Nos. 1, 2, 3, 4, and 6? A. They did, and they had knowledge of the types.

Recross Examination

By Mr. Hassell:

Q. Mr. Holgerson, do you contend that Exhibit 5 is as much a book as the other five exhibits in this case, do you?

Mr. Deacy: That is objected to.

The Court: You may state your objection.

Mr. Deacy: The question is objected to on the ground that it is argumentative.

The Court: Read the question.

(Question read.)

The Court: Objection overruled.

The Witness: Exhibit No. 5, as I remember it, is "Essentials in English-Laboratory Method Test Book 12 R," in question?

Q. Yes. A. I would say according to the terminology in the industry that it would be considered a book, yes.

Q. Just like the other books? A. Well, there is a difference. That is the same type of paper and cover—
1278 this is what we call a craft or Port Huron cover.

Q. Exhibit 5 is fastened together with staples and Exhibits 1, 2, 3, 4, and 6 are in the binding, they are sewn together? A. They are stitched with wire.

And also: **Robert E. Lambert** called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. Deacy:

Q. You may state your name to the Court. A. Robert E. Lambert.

Q. Where do you live? A. Washington, D. C.

Q. Do you occupy any government position? A. At the present time I am Assistant Clerk of the Appropriations Committee of the House of Representatives.

Q. In July, 1941, did you occupy any official position? A. I did at that time. I was Clerk of the Post Office and Post Roads Committee of the House of Representatives.

Q. As such did you attend all of the hearings held in July, 1941, relative to the so-called Book Bill? A. I did.

Q. I will ask you to state whether or not any books commonly called or referred to as work books were produced before and accepted by the members of that Committee. A. There were.

(Question objected to.)

The Court: Why?

1279 Mr. Hassell: I submit the hearings before that Committee are before the Court and in evidence, and they speak for themselves.

The Court: Are not the hearings the best evidence?

Mr. Deacy: They are the best evidence of what is shown there, but this is a matter that is not covered in the report itself and there has some confusion arisen, I believe.

The Court: Is this an attempt to impeach the written report?

Mr. Deacy: No, sir, it is merely to supplement the report. No attempt whatever to impeach the written report of the Committee. It is merely to show what the Committee did have before it.

The Court: The Court will permit the witness to answer and reserve a ruling.

(Question and answer read.)

Q. Have you copies with you of those books? A. I have copies of two that were submitted to the Committee at that time.

Q. Will you produce those copies, please?

(And thereupon the copies were produced and marked Plaintiff's Exhibits 8 and 9.)

Q. I hand you two exhibits which have been marked Exhibits 8 and 9, and ask you to tell His Honor what they are. A. Exhibit No. 8 is Book III New Plain Way English Exercises Self-Correcting Laboratory Plan of Walsh and Walsh.

Q. And what is Exhibit No. 9? A. It is published by the McCormick-Mathers Publishing Company of Wichita, Kansas. Exhibit No. 9 is Essentials in English-1280 Laboratory Method Book II, New Edition, Smith and McAnulty, published by the McCormick-Mathers Company at Wichita, Kansas.

Q. Do those books contain perforated pages? A. They do.

Q. Were those books which were before the House Committee at the hearing heretofore referred to? A. Yes, sir.

Q. Was each member of the Committee furnished with a copy of each of those books? A. Each member present, yes.

Q. Are those two of the original books which were actually before the Committee? A. They are. I took them from the Committee files last week.

Q. Will you tell His Honor whether or not the Committee in considering this bill and the amendments thereto considered any other work books other than those which have been offered in evidence, if there were any other work

books before the Committee? A. There were some other books presented, but I could not identify them at this time.

Q. I am talking about school work books. A. School work books, yes.

Mr. Deacy: I wish to offer in evidence Exhibits 8 and 9.

The Court: Is there objection?

Mr. Hassell: I would like to see the exhibits, Your Honor. (Here same are handed to Mr. Hassell.)

Mr. Hassell: I would like to reserve an objection to these Exhibits 8 and 9 offered by the plaintiff along the lines of the same objection I made a while ago to the witness' testimony in respect to the fact that the matter was not shown in the hearings of the House Committee.

The Court: The Court understood counsel for the petitioner to say that you were offering this testimony for the purpose of supplementing the record?

Mr. Deacy: Yes, Your Honor, and he explained too the reference in the admitted reports to determine the meaning of the term "work books." Work books were discussed before the Committee and the record shows that the work books were presented to the Committee to show that these identical books were the books referred to in the Committee's report, and which were considered by the Committee at the hearings.

The Court: The Court has not had an opportunity to examine the hearings and the ruling will be reserved at this time on the objection made by counsel for the Government.

Cross Examination

By Mr. Hassell.

Q. Mr. Lambert, you stated that you are at present an assistant clerk to the Appropriations Committee of the House? A. Yes.

Q. Are you employed by the plaintiff here? A. I am not.

Q. Have you not represented the plaintiff before the Post Office Department? A. Not in any official capacity.

I have talked to the Post Office Department about this legislation, about this bill, because they were not interpreting it as I thought the Congressman intended.

Q. You have particular reference in those talks to 1282 Mr. Wentzell, the Third Assistant Postmaster General, to the McCormick-Mather books and to the perforated page books of that concern, did you not? A. Yes.

Q. You were not employed by that concern to discuss those pamphlets? A. No, I was not employed by them at all.

Q. It was simply a voluntary act on your part? A. Yes.

Q. Why did you become interested in that concern, and not in others? A. They were the ones that had the books before the Committee, and raised the question as to work books, and because their books were considered by the Committee, and it was my full and complete understanding that the Committee and Congress intended that those books should be carried at the book rate?

Q. These Exhibits 8 and 9, offered in connection with your testimony, you say they were removed from the official files of the House Committee? A. I borrowed those from the Committee files, and when they have served their purpose I hope the Court will permit me to return them to the files.

Q. Did you have permission of the Chairman of the Committee to remove them? A. I had permission of the Clerk.

Q. Did you advise the Clerk what use was to be made of them? A. No, I asked him if I might have them. There are several in the files.

Q. Can you point to any page, or any testimony in Exhibit C, that is the House Post Office Committee hearings in evidence here, showing that there was a discussion 1283 before the Committee of perforated page work books? A. I do not think there was. I do not think that question came up.

And also: **George E. Carr** called on behalf of the plaintiff, being first duly sworn, testified as follows:

By Mr. Deacy.

Q. Will you give your name, please? A. George E. Carr.

Q. Where do you live, Mr. Carr? A. Logan, Ohio.

Q. What is your business or occupation? A. Superintendent of schools.

Q. Whereabout? A. At Logan, Ohio, city of Logan.

Q. Do you occupy any official position in the school system in the State of Ohio? A. Member of the State Board of School Examiners.

Q. And you have been for how long? A. Five years.

Q. How long have you been connected with the public school system and educational systems in your experience? A. Twenty-eight years.

Q. Mr. Carr, are you familiar with the phrase or term "work book"? A. Yes.

Q. I will ask you to state to His Honor whether or not that term or phrase has a well understood and accepted meaning among educators in this country. A. I believe it does.

Q. Will you define the term or phrase "work book" as it is generally understood? A. Well, it is a book with questions or problems, in case of mathematical books 1284 some blank spaces are left for the work by the student, or insertion of answers by the student; in other words, it is an educational tool the same as is commonly termed textbooks.

Q. What about perforated pages, is that a common characteristic of the work book? A. Yes.

Q. What are the purposes of perforated pages in the work books? A. Well, that is placed there for the convenience of the teachers. I say for their convenience because they have indicated that they prefer the perforated pages.

Q. Do perforated pages serve a useful purpose and add to the efficiency of the book? A. Yes.

Q. Mr. Carr, are you familiar with the work books published and distributed by the plaintiff in this case, "Essen-

tials in English, Individual Corrective Exercises to Elemental School English," and "New Plain Way English Exercises"? A. Yes, we have used them in our schools.

Q. Are work books widely used all over this country in the public schools? A. Yes.

Q. And have they become a valuable and accepted tool of teaching? A. They have.

Q. And are so recognized? That is right.

Q. Does the State of Ohio furnish free textbooks to school children? A. Yes, since about 1936, I believe.

Q. What about work books? A. They make no distinction as far as furnishing books to school boards between the work book and the textbook.

Mr. Deacy: Those are all the questions I have to ask.

1285 Mr. Hassell: If Your Honor please, I move to strike this testimony. There is nothing in this law respecting work books. The law says "books". Counsel is attempting to give the meaning of the term used by the witness before the House Post Office Committee when one of these bills which finally resulted in this Act was passed. I think the testimony is incompetent, irrelevant and immaterial, and I move that it be stricken.

The Court: The Court will reserve a ruling at this time. If it is found to be not objectionable it will be admitted. Otherwise, it will be excluded.

Cross Examination

By Mr. Hassell.

Q. Mr. Carr, you stated that the State of Ohio furnishes books free to children, some of which are work books? A. That is right.

Q. And about what portion of the books furnished are work books? A. I have no way of answering that, because it is left to the individual school system to require the pupils to buy the books, or to furnish them as they see fit.

Q. Some schools might not use them at all? A. That is right.

Q. Some might use one or more? A. That is right.

Q. Some of these work books are permanently bound and do not have perforated pages? A. I do not know—there is only one we use in our system that is not perforated. I would not know the portion that are perforated and 1286 are not perforated. I do know there are perforated and non-perforated books on the market.

And also: **Newton P. Blatt** called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

By Mr. Deacy.

Q. Will you give your name to the Court? A. Newton P. Blatt.

Q. Where do you live? A. New Lexington, Ohio.

Q. What is your business? A. Superintendent of the public schools of New Lexington, Ohio.

Q. How long have you been connected with the public school system? A. Twenty-eight years, including two in the Army service in the first World War.

Q. Are you acquainted with the type of school books used in the public school systems of Ohio? A. I am.

Q. Are you familiar with the school textbook commonly referred to as “work book”? A. I am.

Q. Has that been a more or less modern development in education in this country in the past twenty years? A. Yes.

Q. Are work books commonly and widely used at this time? A. They are, I know of no school of my acquaintance that does not use one or more work books.

Q. Does the term “work book” have a well-recognized customary meaning among educators in this country? 1287 A. It does.

Q. Will you tell His Honor what the meaning of that term “work book” is, its usual and customary meaning? A. It is a book that is used for instruction purposes.

In some cases it may be used in connection with other books, and in many cases it is used as the principal text in various classes. We are using it as such in our school system and it is furnished by the board in accordance with the state law just as we furnish textbooks, that is, properly bound books.

Q. Is the characteristic of work books that are generally used that they have blank spaces to be filled in by the students and all or portions of the pages of the book are perforated? A. Virtually all of them, or all I know of. I think the one that we used this past year in the first grade was not one of your publications. I recall the pages of that book were perforated. We did not see fit to tear the pages out. Personally all the work books with which I am acquainted have perforated pages.

Q. Is it customary that some teachers elect to remove the pages, and others elect to leave the pages in the book? A. That is correct.

Q. Are you familiar with the books published and distributed by the plaintiff in this case, hereinbefore referred to as Book II New Plain Way English Exercises and Individual Corrective Exercises, Essentials in English-Laboratory Method Books II and III, and Cumulative Review, Plan Way English Book? A. We have used the publications in both our junior and senior high schools for a period of years.

Q. Are those books prepared in the same manner 1288 and bound along the same general principle as all other work books are prepared and bound? A. That is correct.

Q. They are no different from work books published by the publishers? A. I have not considered them so.

Q. Has the work book developed into a valuable tool for educational purposes. A. Without a doubt. We order work books in the summer before the school starts in the fall, and many textbooks are ordered, and on hand to start the

school year, and as tests some use self-principle textbooks and others are used in connection with other books.

Q. What is the comparative cost between the ordinary work book and textbook? A. The cost of the work book is considerably less than our regular bound texts.

Mr. Deacy: I believe that is all. Thank you, Mr. Blatt.

Mr. Hassell: I would like to reserve the same objection as to this witness' testimony as was made to the prior witness' testimony.

The Court: The Court will reserve a ruling on the admissibility of the testimony. May I inquire of counsel for what purpose is the testimony of this witness offered?

Mr. Deacy: One of the main purposes of the testimony is to explain to the Court, for the benefit of the Court, in finding whether or not this is in fact a book, the method for which it is printed, constructed and used, and for the further purpose of throwing light upon the meaning of the phrase "work book," as it was used in the hearings before the Congressional Committees, and in the reports of the Committees, and to be of aid to the Court in determining

whether or not publications published by the plaintiff and referred to in the petition are books consisting of reading matter and having incidental spaces for the students' notations as that term is used by the Act of Congress.

The Court: Will counsel for the defendant state the grounds of his objection?

Mr. Hassell: The law, the Act of June 30, 1942, simply mentions "books" containing incidental blank spaces for students' notations. It says nothing about "work books." Work books were discussed in the hearings before the House Post Office Committee, as Your Honor will note when you examine the hearings. Counsel for the plaintiff is seeking now to go beyond those hearings and to describe to Your Honor what a work book is. At those hearings there was no discussion of this perforated paged temporary binding matter, except Congressman Curtis in his testi-

mony before the Committee, he introduced one of the pages and said that the blank spaces for the incidental notations would induce the student to retain the book longer, preserve it longer, it would be a personal attachment of the student to the book by reason of these incidental notations, indicating that he had reference to a permanent book, and I submit that the question of what work books are, and particularly to try to show that the alleged work books referred to in the hearing before the House Committee were perforated page books and there was no discussion of perforated page books in the record, I think that will not be of value to the Court in the determination of this issue.

Mr. Deacy: I just want to say to Your Honor that 1290, in connection with the statement made by counsel for the defendant that in the statement of the managers on the part of the House in the joint report of the House and Senate Committees reference is made to the amendment which is included in the bill including books consisting of reading matter having blank spaces for students' notations; reference was made in the following language: "This amendment was insisted upon by the House Conference in order that educational textbooks that had come into common use during the last two decades commonly referred to as work books might enjoy the same postage privileges as other books.

The Court: The Court has indicated that it will reserve a ruling in view of the statement of counsel.

Cross Examination

By Mr. Hassell.

Q. Mr. Blatt, did you testify on direct that in the schools under your supervision perforated paged work books are used but the pages are not removed? A. They may or may not be removed, according to the wishes of the individual instructor.

Q. Didn't you say that they were not removed by the students or teachers in your schools? A. No.

1291 And also: **R. Merle Eyman** called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

By Mr. Deacy.

Q. Will you give your name, please? A. R. M. Eyman.

Q. Where do you live? A. Lancaster.

Q. What is your business or occupation? A. Superintendent of the Fairfield County Schools.

Q. How long have you been superintendent of those schools? A. Sixteen years.

Q. How long have you been connected with teaching and educational work? A. Twenty-six years.

Q. Mr. Eyman, I will ask you to state whether or not the phrase or term "work book" has any common well-understood definite meaning among educators. A. I believe it has.

Q. Will you kindly tell His Honor what the common well-understood meaning of that phrase is? A. I would say it is a book which is used as an educational device for further instruction and to help the pupils in their assignments in securing their education.

Q. Has the work book become a widely used and useful tool in education? A. Yes, it has.

Q. Do you use it in your schools? A. We do.

Q. Are you familiar with the work books published and distributed by the plaintiff in this case, and heretofore referred to as Exhibits 1, 2, 3, 4, 5, and 6? A. With
1292 most of them, one or two of those we have not used, but I am familiar with most of them.

Q. Are they published and bound in the same form and manner as the work books are commonly bound and arranged? A. So far as I know, they are.

Q. Is it a common characteristic of the work books that there is a blank space for the students' memorandums and notations? A. It is.

Q. And is it a common characteristic of work books that they have those perforated pages? A. I believe that is a common characteristic. We have used some both ways.

Q. In the use of the work book with perforated pages do some teachers require children to remove the pages from the books for the purpose of grading and do others require people to keep the page in the book? A. That is right.

Q. In the event the page is removed from the book are the answers of the student corrected and is the page then returned to the student for the purpose of his enlightenment to see where he has made his mistake? A. Usually that is the case.

Mr. Deacy: I believe that is all.

Mr. Hassell: May I have the same objection noted?

The Court: The Court will make the same ruling as it has to the testimony of the previous witness, reserving the ruling as to its admissibility.

Q. (By Mr. Deacy) Are the books that you have referred to as work books provided to students in the State of Ohio under the Ohio free textbook law? A. That is right.

Q. Do you know whether the officials of Ohio have approved the use of that book and is furnishing it free to the students? A. They have.

Q. And on the same basis as the textbook? A. They have.

Cross Examination

By Mr. Hassell:

Q. Mr. Eyman, you testified that some of these six exhibits in issue in this case are used in your schools or the schools under your supervision and some are not, will you state which are, and which are not? A. The Essentials in English.

Q. That is Exhibit 5 that I showed you, was that used or not? A. Those are used. I do not know whether you have the one there "Industrial Arts" or not. We used the one in Industrial Arts.

Q. Is this Exhibit 5, "Essentials in English-Laboratory Method," a typical work book? A. I would say it is.

Q. Is it ordinarily the practice to have on each test a blank for the student's name, signature, instructor's signature, date, and on each sheet the copyright of the publisher throughout the entire book? A. I think that is correct. I have not observed anything to the contrary.

Q. The pages are not being numbered as the pages in an ordinary book? A. That is right.

Re-direct Examination

By Mr. Deacy:

Q. You stated a moment ago that you used the 1294 book in your schools described as "Essentials in English," is Exhibit 3 "Essentials in English Laboratory Method Book II" used and is "Essentials in English Laboratory Method Book III" used? A. That is correct.

Q. You do use those? A. Yes, and we also use the one "Industrial Arts."

And thereupon a recess was had until two p. m. of same day.

Tuesday Afternoon Session,
August 29, 1944.

And Thereupon the Plaintiff Rested.

And Be It Further Remembered, That the defendant to maintain the issues on his part to be maintained, introduced and offered in testimony the following evidence, to wit:

Nelson B. Wentzell called on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. Hassell:

Q. State your name and official position. A. Nelson B. Wentzell, Deputy Third Assistant Postmaster General.

Q. Spelled W-e-n-t-z-e-l-l? A. Yes.

Q. How long have you held that position? A. Since 1295 November, 1943.

Q. Prior to that time what position did you hold? A. Superintendent of the Division of Classification.

Q. Division of Classification in the Post Office Department has to do with the postal rates on books and periodicals, and other mail matter, does it? A. It does.

Q. How long had you held that position? A. About twenty-five years.

Q. Prior to that time you were Assistant Superintendent of the Division of Classification? A. I was.

Q. Prior to that time you were Clerk in the office of the Division of Classification? A. I was.

Q. A total service of how long? A. Thirty-eight years.

Q. Mr. Wentzell, can you state to the Court whether or not the Third Assistant Postmaster General has maintained a constant ruling on the question of perforated paged pamphlets as to whether or not they are books under the Act of June 30, 1942, since that Act was passed? A. Yes.

Q. What has that ruling been? A. That a publication having perforated pages with the intention of being removed, whether anything was said to that effect or not, was not entitled to the special book rate as established by the Act of June 30, 1942.

Q. Why was that? A. Because it was regarded as an essential characteristic of the book that it should be a permanent publication.

Q. Prior to the passage of the Act of June 30, 1942, books were accepted under book rate, were they not? A. They were.

1296 Q. Under executive orders issued by the President? A. Yes.

Q. When were the first of those orders issued? A. October 31, 1938, I believe.

Q. From that time up to the time of the passage of the Act was the ruling with reference to perforated pages and

pamphlets, not being books, the same as it was after the passage of the Act of June 30, 1942? A. It was the same.

Q. Prior to the President's executive order did you have occasion to pass upon the question whether perforated paged pamphlets were books entitling the sender to a special postage rate? A. Yes, under the third class a rate up to eight ounces which is the limit to that class of mail. There are two rates of postage, one for books, and another miscellaneous printed matter, articles embraced in the third class.

Q. What was that ruling? A. If the publication had perforated pages, it was not entitled to that book rate under the third classification.

Q. So it is a fact that for many years the Post Office Department has consistently held that perforated pamphlets are not permanently bound and are not books under the classification Act? A. That is right.

Q. Mr. Wentzell, the Department administering the Act of June 30, 1942, does it experience any difficulty in drawing a line as to what are books and what are not books under the Act? A. It experiences a very lot of difficulty, a great deal of difficulty, because the rate is such as to attract the types of matter that can be adapted to book form. Consequently we have to pass upon hundreds of exhibits that are
1297 submitted with the idea that they might obtain this special book rate.

Q. Do you have one or two samples of matter that has been submitted in the form of possible work books that they have attempted to get this rate aside from the perforated page proposition? A. Yes, I have here this particular specimen.

Q. This is entitled "Cursive Writing Kittle Method Work Book Rate 48". I would like to have this marked as an Exhibit and offered in evidence.

And thereupon the book was marked for identification as Defendant's Exhibit 1.

Q. Was this Defendant's Exhibit 1 given the book rate?
Mr. Deacy: We object.

The Court: It has not been admitted in evidence.

Mr. Hassell: I wanted the Court to see it. I am trying to show the problem that the Department has.

The Court: What difference would it make what problems it has. What has that to do with this case? They probably have a lot of problems over there, but how would they solve the present situation?

Mr. Hassell: I am in agreement with that. I was trying to show by this witness that the Department had to draw a line. It has to draw a line.

The Court: The Court will take judicial notice of the fact that they have to draw a line. The question in this case is whether they have drawn a proper line. The Court is unable to see how it is material to the issues presented.

Objection sustained.

1298 Q. Mr. Wentzell, did you attend the House Committee hearings covered by Exhibit B in this case? A. Yes.

Q. At that time you were Superintendent of the Division of Classification of the Post Office Department, were you not? A. I was.

Q. You were most directly interested in the matter under consideration by the Committee so far as the Post Office Department was concerned? A. Yes.

Q. And during those hearings was there any discussion, was there any intimation by any members of the Company that they had under consideration a ruling of the Department with reference to perforated pamphlets?

Mr. Deacy: We object to the question. The proceedings had before the House Committee are in evidence, and they are the best evidence of what transpired.

The Court: Is that statement consistent with your statement this morning as to supplementing the record?

Mr. Deacy: I believe so.

(Question read.)

The Court: The question is too broad, too general. Objection sustained. There might have been discussion. He

might not have been there. He has not shown he has any knowledge.

Q. Can you point to any page in Exhibit C, the records of the hearing showing that there was any discussion of the perforated page pamphlets before the Committee? A. No, I cannot.

Q. At the time certain so-called work books, which 1299 are offered in evidence as Exhibits 8 and 9, were handed to members of the Post Office House Committee during those hearings covered by Exhibit C, was there any attention called to the perforated pages in those pamphlets? A. There was not.

Cross Examination

By Mr. Deacy:

Q. Mr. Wentzell, you say you are the Deputy Third Assistant Postmaster General? A. I am.

Q. And you appear here in this case in that official capacity? A. Surely, as a witness.

Q. How did you happen to come? A. As a witness.

Q. Were you subpoenaed? A. No.

Q. Who directed you to come here? A. The solicitor of the Post Office Department.

Q. And you brought with you the official Department files of the Post Office Department? A. I did.

Q. And you have been here aiding counsel for the Post Office Department in the defense of this action? A. Well, I have given him what information I have as to the facts of the matter.

Q. Now, isn't it a fact, Mr. Wentzell, that the President of the United States in the year 1938 entered an order providing for the reduction of a cent and a half on the rate on books for the purpose of disseminating knowledge and learning? A. He so stated in his proclamation.

Q. Isn't it a fact after that order was issued your 1300 Department excluded work books from the mails

which had blank spaces for the students' notations? A. It did.

Q. Work books are generally regarded, are they not, as a useful tool in education? A. I presume they are.

Q. And it has come to your knowledge, has it not, that they are widely used in public schools and other institutions of learning in this country? A. According to the information that was presented, yes.

Q. You know that as a matter of fact from your own knowledge? A. No, I do not, but I do from the statements that have been made on behalf of those who are in the business of publishing these, and other interested organizations and associations.

Q. Now, as I understand your position, you say that your contention is that work books published by the plaintiff in this case of the character marked Exhibit 3 entitled "Essentials in English-Laboratory Method Book II New Edition" that they are not admissible to the mails at the book rate because they contain some pages which are perforated? A. That is right.

Q. And it would be your position, would it not, sir, that with that type of book if none of the pages were perforated that it would comply with all the regulations and be admitted to the mails under the book rate? A. If the perforations were omitted and the spaces on each page indicating where they do, what is to be entered, or if they had any instructions to the use of the book to the effect that they were to be taken apart and used piece by piece, that is all to be considered.

1801 Q. Didn't you tell me last night if these books did not have perforations you would have no objection to them? A. Yes, that is the serious objection.

Q. That is the real reason you contend that they should be excluded? A. Because of the perforations.

Q. Now, Mr. Wentzell, the fact that a pupil or a teacher might buy a book which had no perforated pages and after that book was delivered to the teacher or pupil that one or

the other of them might tear out a page out of that book, or tear out ten pages, that would not make a bit of difference, would it? A. No, it would not.

Q. And that would not render the book non-mailable under the book rate, would it? A. I do not quite understand your question, the purport of it.

Q. Well, I say the fact that a child might buy one of these books from his teacher, or any book store, after it had already gone from the publisher to that teacher or the book store, if it had no perforated pages, if a child should elect to tear out a page, you would not claim that that rendered the book non-mailable at the book rate, would you, the fact that that might possibly happen? A. It would depend on the extent to which pages were torn out and what would be left of the publication. If a complete publication the regulation says they shall be permanently bound.

Q. You regard the binding of this book as permanent? A. As far as the binding.

Q. As far as the binding is concerned the binding of the book complies with the regulation, doesn't it? A. Yes.

Q. Does the binding of this book comply with the 1302 regulation? A. Yes. (Submitting book to witness.)

Q. Now, the book we referred to a moment ago has been marked by the reporter as Exhibit No. 10. You say that the binding of that book complied with the regulations and is a permanent binding. Is that book entitled to pass through the mails? A. I did not examine it as to its contents.

Q. At the rate of three cents a pound. You do not examine these work books to see if they have the physical characteristics now? A. As far as the binding.

Q. These books do all have the characteristics except they are of a work book nature? A. Except that they have perforated pages.

Q. Will you examine this book, please, Exhibit 10? (After examining same.) A. This would be accepted at the book rate.

Q. And the title of that book is "Phantom Lady"?

Mr. Hassell: We object.

The Court: Objection sustained, the title speaks for itself.

Mr. Deacy: We will offer the book in evidence.

The Court: Is there objection?

Mr. Hassell: Yes, it has no bearing on this case whatsoever. They are attempting to bring in the textual content of the publication in this hearing which has no place in it.

The Court: May I see it? (Same handed to the Court.)

And for what purpose is it offered?

Mr. Deacy: It is offered as an indication of the Post Office ruling in connection with the matter of binding the books and the character of the book that the witness says is permitted to pass through the mails at the book rate.

The Court: How will it assist in the determination of the question involved in this case?

Mr. Deacy: If there is question about it, I will withdraw the offer, if Your Honor please.

The Court: Very well.

Mr. Deacy: That is all. Thank you, Mr. Wentzell.

* * * * *

869

Filed Mar 13, 1946

Exhibit No. 8

House of Representatives

77th Congress 2d Session

Report No. 2239

Establishing Preferential Rates of Postage for Certain
Religious and Educational Books

June 15, 1942.—Committed to the Committee of the Whole
House on the state of the Union and ordered to be printed.

Mr. Burch, from the Committee on the Post Office and Post
Roads, submitted the following

REPORT

[To accompany S. 337]

The Committee on the Post Office and Post Roads, to
whom was referred the bill (S. 337) to provide preferential
rates of postage for certain religious and educational books,
having considered the same, report favorably thereon with
amendments and recommend that the bill as amended do
pass.

The amendments are as follows:

Strike out the title of the bill and insert the following:
“Providing preferential rates of postage for certain re-
ligious and educational books.”

Strike out everything after the enacting clause and insert
the following:

That for the purpose of fixing postage rates on religious
and educational books consisting wholly of reading matter
and containing no advertising matter other than incidental
announcements of other books there shall be established the
following classifications:

(a) Religious books which shall consist of the Bible and any other book or books used by any group, sect, system, or faith of worship manifesting a belief in the Supreme Being; love and obedience toward God, and/or conformity to Biblical precepts.

(b) Educational books (including books with work sheets) which shall consist of any book or books used in the training, guiding, disciplining, developing, strengthening, or improving the moral or mental character of students.

Sec. 2. The postage rate on religious and educational books, when mailed under such regulations as the Postmaster General may prescribe, shall be 3 cents per pound or fraction thereof, irrespective of the postal zone of destination thereof, except that the rates now or hereafter prescribed for third- or fourth-class matter shall apply in every case where such rate is lower than the rate prescribed herein for books under this classification.

Sec. 3. To be entitled to the preferential rates provided for religious and educational books, the publisher of any such book shall furnish to the Postmaster General, at such times and under such conditions as the Postmaster
870 General may prescribe, satisfactory evidence under oath or affirmation from the governing body of the religious or educational institution using such book or the public officer or body charged with the duty of approving books for use in the State in which such institution is located, that the book or books concerned are approved for use for religious or educational purposes.

Sec. 4. This Act shall take effect July 1, 1942.

Amend the title so as to read: "Providing preferential rates of postage for certain religious and educational books."

Under date of October 31, 1938, by proclamation of the President, to become effective November 1, 1938, and ending June 30, 1939, the postage rate on books consisting wholly of reading matter and containing no advertising matter other than incidental announcements of books was set at

1½ cents per pound irrespective of the zone of destination.

Prior to such time books had been mailed at parcel-post zone rates ranging from 8 cents per pound in the first zone to 26 cents per pound in the eighth zone. The purpose of the reduced rate was said to be to promote cultural growth, education, and development of the American people, to continue for an 8-month period subject to a further extension by action of Congress if it actually resulted in substantial reductions in the price of books generally to the American public.

To date the Congress has not completed action on a proposed preferential postage rate on books, although by proclamation the 1½ cents per pound rate has been continued on three different occasions, the last continuation being until June 30, 1942.

Under date of June 30, 1941, a bill, S. 337, in almost the exact language of the Presidential proclamation, passed the United States Senate and was referred to your committee. Hearings were held on the Senate bill and three similar House bills under dates of July 11, 16, 17 and 22, 1941. In executive session of the committee, held for the discussion of the various book rate bills, certain pertinent questions were raised and a subcommittee was appointed to consider all suggestions made to the committee and report back to the committee their findings and recommendations, which are included in the above suggested amendments to S. 337.

Your committee are of the opinion that there is little or no reason for a subsidy in postal rates for any class of mail, that all classes of mail should pay a reasonable amount for the service comparable to the cost thereof, and that the time has come for a general reclassification of postal rates. At the present time the preferential rate on books pays, in effect, a subsidy of more than \$7,000,000 a year. Your committee have failed to find that the purpose of "substantial reductions in the price of books generally to the American public" has been accomplished by the 1½ cents per pound book rate. Furthermore, the rate has not been extended to

a type of educational textbooks that have come into common use during the last two decades commonly referred to as workbooks. They are books containing the printed text or subject matter just as it is contained in formal textbooks, and in addition thereto have blank spaces in which the student may write answers and other memoranda gathered in his study of the subject. It was testified to before your committee, and remains uncontradicted, that 25 per cent of the instruction materials that goes into the classrooms of America are of the workbook variety. A provision in the present bill includes such books, recognizing them as useful in classroom instruction.

Since a majority of libraries, religious and educational institutions are financed through taxation or by the people, your committee find less objection to a subsidy on books used by such public institutions than to fictional, satirical, erotic, and other books published primarily for profit.

It is the purpose, therefore, of your committee in reporting this bill to provide a preferential postage rate of 3 cents per pound or fraction thereof, irrespective of the postal zone of destination, for religious and educational books. While agreeing with the thought originally expressed in the Presidential proclamation of promoting the cultural growth, education, and development of the American people, your committee cannot but look with disfavor upon an annual expenditure of more than \$7,000,000 which in our opinion does not inure to the benefit of the reading public but is in fact a subsidy. The Cost Ascertainment Report of the Post Office Department shows the following relative to revenues and expenditures for the 3 years the 1½-cent-per-pound book rate has been in operation:

	Revenue	Expenditure	Deficit
Books, paid at 1½ cents per pound under section 572½, Postal Laws and Regulations for fiscal year 1939:			
8 months only reporting	\$1,164,327.55	\$4,730,073.97	\$3,565,746.42
Same for fiscal year 1940	2,498,747.71	9,883,939.04	7,385,191.33
Same for fiscal year 1941	2,618,737.77	9,961,563.25	7,342,825.48

In other words, the book rate for the 3 fiscal years reporting has produced revenues of \$6,281,813.03, expenditures of \$24,575,576.26, and a deficit of \$18,293,763.23. In order to eliminate so far as possible this deficit and at the same time continue preferential consideration for religious and educational books, your committee gives you the Senate bill amended for such consideration as the House may see fit to give it.

The subject matter of the bill has been troublesome and many views have been presented, but your committee has tried to meet and effect as fair a disposition of each problem as was possible. Thus the bill carries a provision to include workbooks if approved by the proper authority since it appears this type of book is used almost exclusively in classroom work and is useful in educational development. Another provision broadly defines religious books; another educational books, and to eliminate administrative difficulties a provision is included which requires the publisher of a book, the person most interested in its acceptance and use by the public, or some other interested person to obtain and present to the Postmaster General satisfactory evidence from the governing body of the religious or educational institution proposing to use the book that the book concerned is approved for religious or educational purposes. Another provision provides that in instances where the regular parcel-post rate is lower than the 3-cent-per-pound over-all rate on these books that the mailer shall have the benefit of the lower rate.

* * * * *

Filed Mar 13, 1946

Exhibit No. 10

House of Representatives

77th Congress 2d Session

Report No. 2261

Providing for Permanent Postage Rate of 1½ Cents Per
Pound on Books

June 22, 1942.—Ordered to be printed

Mr. Burch, from the committee of conference, submitted the
following:

CONFERENCE REPORT

[To accompany S. 337]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 337) to provide for a permanent postage rate of 1½ cents per pound on books, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill, and agree to the same with an amendment, as follows:

In lieu of the language inserted by the House amendment, insert the following:

That the postage rate on books consisting wholly of reading matter or reading matter with incidental blank spaces for students' notations and containing no advertising matter other than incidental announcements of books, when mailed under such regulations as the Postmaster General may prescribe, shall be 3 cents per pound or fraction thereof, irrespective of the postal zone of destination thereof: Provided,

That this Act shall not affect the rates of postage on books mailed by or to libraries and organizations as prescribed by the Act of February 28, 1925, as amended (39 U. S. C., 1934 ed., sec. 293a).

And the House agree to the same.

That the Senate recede from its disagreement to the amendment of the House to the title of the bill and agree to the same with an amendment as follows:

In lieu of the language inserted by the House insert the following:

943 An act to provide for a permanent postage rate of 3 cents per pound on books.

And the House agree to the same.

T. G. BURCH,
HARRY L. HAINES,
J. PERCY PRIEST,
FRED A. HARTLEY, JR.,
WALTER C. PLOESER,

Managers on the part of the House.

KENNETH MCKELLAR,
CARL HAYDEN,
JAMES J. DAVIS,

Managers on the part of the Senate.

944 STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE.

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill, S. 337, to provide for a permanent postage rate of 1½ cents per pound on books, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report.

The House conferees agreed to accept as the basis of the bill the language of the Senate bill to be amended in line 4 by inserting "or reading matter with incidental blank spaces for students' notations." This amendment was insisted

upon by the House conferees in order that educational textbooks that have come into common use during the last two decades, commonly referred to as workbooks, might enjoy the same postage rate privileges as other books.

It was then agreed that the preferential rate should be 3 cents per pound or fraction thereof, instead of the present $1\frac{1}{2}$ cents set by Presidential proclamation. This change was insisted upon in order to eliminate as far as possible the deficit that has accrued each year since the preferential postage rate on books has been in effect.

It was then agreed that the following provision be inserted:

Provided, That this Act shall not affect the rates of postage on books mailed by or to libraries and organizations as prescribed by the Act of February 28, 1925, as amended (39 U. S. C., 1934 ed., sec. 293a).

This amendment was to protect the present law giving to library books certain preferential rates.

It was then agreed that the title to the bill should be amended to conform to the contents thereof by striking out the figures " $1\frac{1}{2}$ " and inserting in lieu thereof "3".

T. G. BURCH,
HARRY L. HAINES,
J. PERCY PRIEST,
FRED A. HARTLEY, JR.,
WALTER C. PLOESER,

Managers on the part of the House.

* * * * *

Exhibit No. 21

1244

Post Office Department
Third Assistant Postmaster General
Washington 25, D. C.

Division of Classification

In your reply refer to C. D. No. 107268.

September 22, 1942.

Postmaster,
Wichita, Kansas.

My dear Sir:

Receipt is acknowledged of your letter of September 15 (HAH: MHP), regarding the acceptance at the book rate of 3 cents a pound of Tests Book II New Edition of "Essentials in English Laboratory Method," prepared by the McCormick-Mathers Publishing Company, your city, consisting on its entirety of perforated pages, with blank spaces at the head of each test sheet for the names of the student and instructor, date, etc., showing that the pages are designed for removal.

Such matter is not entitled to the book rate, but may be inclosed with books mailed at the postage rate of 3 cents a pound prescribed by paragraphs 5 and 6, amended section 572, P. L. and R., provided postage is paid on such test sheets at the regular third-class rate of 1½ cents for each two ounces in addition to postage at 3 cents a pound on the books themselves.

Very truly yours,

Third Assistant Postmaster General.

LCC-se

Copy

Copy

1245

United States Post Office
Wichita, Kansas.

First Class

In replying please mention initials and date, HAH:MHP.

September 15, 1942.

Third Assistant Postmaster General,
Division of Classification,
Washington, D. C.

My Dear Sir:

Inclosed is a copy of a question and answer pamphlet or book prepared by the McCormick-Mathers Publishing Company of this city and supplements a school text book.

The text book and this supplement or book are mailed by the publishers in the same package and at the book or parcel post rate, whichever is the cheaper. While the inclosure has the regulation number of pages, the pages are perforated for ready removal.

Will you kindly advise if the inclosure is entitled to the book rate and, if not, under what, if any conditions, can it be mailed in the same package with books.

Very Truly Yours,

(Signed) J. B. RIDDLE,
Postmaster.

Enclosure.

1246

Copy

BWM-h

Post Office Department
Third Assistant Postmaster General
Washington 25, D. C.

Division of Classification

In your reply refer to C. D. No. 91120.

Postmaster,
Atlanta, Georgia.

February 21, 1944.

My dear Sir:

Attention is invited to the attached copy of a letter dated February 8, from the postmaster of Wichita, Kansas, regarding a parcel of books mailed at your office by the McCormick-Mathers Company at the rate of 3 cents a pound which had inclosed therewith the attached publications.

The publication entitled "Essentials In English Laboratory Method Test Book III," consisting in its entirety of perforated pages, with blank spaces at the head of each test sheet for the name of the student and instructor, date, etc., showing that the pages are designed for removal, is not acceptable for mailing at the book rate of 3 cents a pound. However, the publication may be inclosed with books mailed at the rate of 3 cents a pound provided postage is paid on such test sheets at the regular third-class rate of 1½ cents for each two ounces in addition to postage at 3 cents a pound on the books themselves. This would also apply to the 16 page pamphlet entitled "Check-Up Test 1-Cumulative Review."

Kindly give this matter attention and take appropriate action.

A copy of this letter will be sent the postmaster of Wichita for his information.

Very truly yours,

Third Assistant Postmaster General

Inc.

1247

Copy

BWM-h

Post Office Department
Third Assistant Postmaster General
Washington 25, D. C.
Division of Classification

In your reply refer to C. D. No. 91977.

Postmaster,
Columbus, Ohio.

February 21, 1944.

My dear Sir:

Attention is invited to the attached copy of a letter dated February 8, from the postmaster of Wichita, Kansas, regarding parcels of books mailed at your office by the McCormick-Mathers Company at the rate of 3 cents a pound which it appears in some instances have matter inclosed that is not entitled to the book rate, etc. See inclosed copy of a letter addressed to the postmaster of Atlanta, Georgia.

Kindly give this matter attention and take appropriate action.

Very truly yours,

Third Assistant Postmaster General.

Inc.

1248

Copy

DWW-GES

United States Post Office
Wichita, Kansas 2

February 8, 1944.

The Third Assistant Postmaster General
Division of Classification,
Washington 25, D. C.

My dear Sir:

This office is having more or less difficulty with the McCormick-Mathers Company, this city, which is a large pub-

lishing house selling text books over the United States, including other material with books mailed at the book rate of 3 cents a pound. Also, their branch offices at 118 Spring St., N. W. Atlanta, Georgia, and Columbus, Ohio.

This morning we received from the Atlanta branch a package weighing 32 pounds mailed at the book rate of 3 cents a pound with 96 cents paid. We examined the package and found it contained the two attached articles, which we do not feel come under the book rate.

It appears to us that all three branches of this firm know well enough what books come under the book rate, but are failing to keep their employees properly informed or are deliberately trying to evade paying postage on articles that must be paid at the third- or fourth-class rate of postage depending on the weight.

We feel that they are getting by without paying enough postage, and this should be referred to the Inspection Department and either make them pay the full third- or fourth-class rates or see that their employees are properly informed and kept informed. Also, that they follow instructions in paying the proper postage.

During the shipping season last year, we opened many of their packages and found they contained articles such as the attached. Then, there are some text books and they enclose them with books at the book rate.

Kindly advise us if the attached articles are intitled to be mailed at the book rate.

This is submitted to you for such attention as you deem it warrants.

Very truly yours,

(Signed) C. M. FRITZWILLIAMS,
Acting Postmaster.

Enclosures

Copy

1249

Copy

91977

March 30, 1944.
25, D. C.

Postmaster,
Columbus 16, Ohio.

My dear Sir:

Receipt is acknowledged of your letter of March 10 (LWB:Sm), concerning the acceptance of certain school publications for mailing at the book rates under paragraphs 5 and 6, section 572, P. L. and R., with which you submitted, "Essentials In English Laboratory Method—Tests Book III," "Individual Corrective Exercises For Elementary School English—Book 6," and Essentials In English Laboratory Method—Book III," published by The McCormick-Mathers Publishing Company, Wichita, Kansas, which concern apparently has a branch in your city.

For the reasons stated in our letter of February 21, addressed to the postmaster of Atlanta, Georgia, a copy of which was furnished your office, the publications entitled "Essentials In English Laboratory Method—Tests Book III," and "Individual Corrective Exercises For Elementary School English—Book 6," the pages of which are designed as student work sheets and perforated to be torn out and used in lieu of stationery, cannot be regarded as acceptable in the mails at the book rates. Even though the pages were not perforated these publications, the pages of which are to be filled out or worked on by students, may not be regarded as books within the provisions of the paragraphs of section 572 named above.

In examining the publication entitled "Essentials In English Laboratory Method Book III," which consists mainly of textual matter there are also a number of pages consisting of work sheets referred to as "First Try" and "Second Try" which are perforated obviously designed to be removed, thus being objectionable for the same reason as the publications referred to in the paragraph above.

Please inform your patrons, therefore, that none of the publications submitted may be regarded as properly acceptable in the mail at the book rate (or rates) under the 1250 provisions of paragraphs 5 and 6, section 572, P. L. and R.

It may be stated that in instances where the nonconforming publication will constitute merely an incidental part of the whole contents of a parcel and does not exceed eight ounces in weight, the nonconforming publication may be accepted as an inclosure with a parcel containing books in the manner set forth in the marked portion of the Notice of July 10, 1942, being prepaid with additional postage at the regular third-class rate of 1½ cents for each two ounces or fraction of two ounces. A copy of the notice is inclosed.

A copy of this letter is inclosed for your convenience.

Very truly yours,

Third Assistant Postmaster General.

Inc.

* * * * *

Exhibit No. 22

1252

148298

October 9, 1942.

Postmaster,
Fowler, Indiana.

My dear Sir:

Reference is made to your communication of September 1, and to the students' "work books" submitted for classification by The Benton Review Shop, your city.

Of the publications submitted the following may be regarded as properly acceptable for mailing at the book rate of 3 cents per pound under paragraphs 5 and 6, section 572, P. L. and R.:

"A First Number Book" by Gale Smith

"Fun With Words—Grade II" by Louise Geddings Carson

- "Good Health Habits for Grade III"
- "20th Century Workbook in Community Civics" by Gale Smith
- "The Health Parade for Grade IV"
- "It's Fun To Be Healthy"
- "20th Century Workbook in American History for Intermediate Grades" by E. W. Cason
- "A 20th Century Workbook in American History for 7th and 8th Grades, Book One" by Gale Smith
- "20th Century Workbook in American History for Senior High School" by Gale Smith
- "Indiana History Text-Workbook" by Gale Smith
- "Language Practice for Primary Grades" by Louise Carson and Gale Smith
- "20th Century Workbook-Text in Plane Geometry" by Leroy W. Shrode
- "More Fun With Words—Grade Three" by Louise Geddings Carson
- "Safety Education" by Carl Burt and Frank Stephens
- "20th Century Workbook in Social Studies—Text and Workbook for Lower Intermediate Grades"
- "The 20th Century Practice-Exercises in Chemistry" by G. M. Bradbury and M. V. McGill
- "The 20th Century Practice-Exercises in Physics" by Gale Smith
- 1253 "20th Century Exercises in English—Grade Three" by Gale Smith
- "The 20th Century Practice-Exercises in Grammar and Language Usage—Grade Eight" by A. E. Wrentmore
- "The 20th Century Practice-Exercises in Grammar and Language Usage—High School" by A. E. Wrentmore
- "The 20th Century Practice-Exercises in Grammar and Language Usage—Grade Seven" by A. E. Wrentmore
- "20th Century Exercises in English—Grade Six" by Gale Smith

"20th Century Exercises in English—Grade Five" by
Gale Smith

"20th Century Exercises in English—Grade Four" by
Gale Smith

The following publications, by themselves, would also be properly acceptable at the book rate, but the supplemental perforated "tests" and "unit tests," being either loose sheets or bound pages with perforated edges, accompanying them go beyond what are permissible as inclosures, thus subjecting the publications to additional postage under the special arrangement referred to in the marked portion of the circular herewith of July 10, 1942; or, to postage at the third or fourth-class rates according to the weight of the parcels:

"The 20th Century Workbook in How to Use a Library"
by Frank S. Stephens and Gale Smith

"20th Century Guide Book in English Grammar and
Usage—High School" by M. Aileen Allman

"20th Century Workbook in World History" by See-
hausen and Smith

"A 20th Century Workbook in Physics" by Leroy W.
Shrode

The following publications are not regarded as acceptable at the book rate for the reasons indicated below:

"A" "How Man is Able to Control and Use the Factors
of His Environment—Book II"

"A" "How Man is Influenced by the Factors of His En-
vironment—Book I"

"B" "An Easy Work and Play Book" by Inez Howard,
Alice Hawthorne and Mae Howard

"B" "Let's Get Started" by Irene Roloff

"B" "Fun With Words—Grade I" by Louise Geddings
Carson

"B" "Fun With Words and Pictures"

1254 "B" "Improved 20th Century Spelling Tablet for
Test and Study Spelling" by Wendell W. Wright

- "B" "Workbook Assignments for the Study of the World's Continents—Book I"
- "B" "20th Century Problems & Projects in Geography—Book Two" by Frederick J. Breeze and Alice Ann Bundy
- "B" "20th Century Problems & Projects in Geography—Book One" by Frederick J. Breeze and Alice Ann Bundy
- "B" "A Workbook in Economics (For High Schools)" by William C. Jardine and Gale Smith
- "B" "Spell-Right Workbook—Grade VI" by A. W. Elliott
- "B" "The 20th Century Practice-Exercises and Objective Tests in Shorthand—Book I" by Lulu May Westenhaver
- "B" "20th Century Workbook in Civics—Senior High School" by Gale Smith
- "B" "Twentieth Century Workbook in Biology"
- "B" "20th Century Workbook in Health for High School" by Frank Stephens and Carl Burt
- "C" "20th Century Drill Pad in Arithmetic—Grade 1" by Gale Smith
- "C" "20th Century Drill Pad in Arithmetic—Grade 2" by Gale Smith
- "C" "20th Century Drill Pad in Arithmetic—Grade 3" by L. H. Whitcraft
- "C" "20th Century Drill Pad in Arithmetic—Grade 4" by L. H. Whitcraft
- "C" "20th Century Drill Pad in Arithmetic—Grade 5" by L. H. Whitcraft
- "C" "20th Century Drill Pad in Arithmetic—Grade 6" by L. H. Whitcraft
- "C" "20th Century Drill Pad in Arithmetic—Grade 7" by L. H. Whitcraft
- "C" "20th Century Drill Pad in Arithmetic—Grade 8" by L. H. Whitcraft
- "C" "20th Century Laboratory Manual in Physics" by Leroy W. Shrode

“D” “The 20th Century Practice-Exercises and Tests in First Year Algebra” by Helen Goddard McNeely

The publications, designated for convenience by Symbol “A,” contain references to “Visual Aids” in the form of moving picture films, giving titles, size, rental costs and where obtained, thus going beyond what is permissible under the law. Although these publications have not been completely measured as to the amount of handwork space contained therein, it appears that such space is more than incidental.

1255 The publications designated by the symbol “B” are designed for coloring, cut-outs, or contain more than incidental blank spaces to be filled out by the pupils using them. See the marked portion of the inclosed circular of July 1, 1942. In the case of the “20th Century Workbook in Civics—Senior High School” and “Twentieth Century Workbook in Biology” there were also submitted supplemental publications entitled “Unit Test in Physics” and “Unit Test in Biology” with the pages perforated along the edges for removal sheet by sheet as each test is given, also going beyond what would be permissible.

The publications designated by the symbol “C,” as the names signify, are merely drill pads, the pages having perforated edges, apparently to facilitate their removal as they are used. These publications are regarded as being more in the nature of stationery than as textbooks. The same condition applies in the case of the publication designated by the symbol “D.”

There were also submitted two 4-page unbound test forms entitled “World History Test For Use in High Schools” which, of course, can not be regarded as books within the contemplation of the regulations.

Very truly yours,

Third Assistant Postmaster General.

Inc.

FRL-rh

88

Copy

TELEGRAM

C. D. No. 93746

Post Office Department
Washington 25, D. C.

May 11, 1943.

Postmaster,
Cincinnati, Ohio.

"Bookkeeping and Accounting—Self-Teaching Course"
acceptable book rate. Other publication, a workbook, hav-
ing blank pages and perforated not regarded as book.
Request unnecessary for overseas shipment if mailed by
U. S. Armed Forces Institute.

BLACK,
Third Assistant.

FRL:rh
Collect

1256

Copy

Vc-va

Post Office Department
Third Assistant Postmaster General
Washington 25, D. C.

Division of Letter and Miscellaneous Mail

In your reply refer to L & M 90877

May 3, 1944.

Mr. William H. Mitchell,
Manager, College Department,
Thomas Y. Crowell Company,
432 Fourth Avenue,
New York 16, New York.

My dear Sir:

Receipt is acknowledged of your letter of April 27, with
further regard to your publication "Selected Experiments

from Laboratory Manual for Introductory College Chemistry," which you desire to mail at the special book rate of postage.

Your statements have been given careful and sympathetic consideration. However, as stated in our letter of April 25, copies of the publication in question are not acceptable for mailing at the special book rate of postage, since, from a postal standpoint, the publication is not such a book as is contemplated by paragraphs 5 and 6, amended section 572, Postal Laws and Regulations. The foregoing would apply even though the pages were not perforated if they were nevertheless intended to be removed, and if they contained more than an incidental number of blank spaces for students' notations.

Very truly yours,

Third Assistant Postmaster General.

1257

91363

Copy

BWM-rml

November 10, 1943.
25, D. C.

Postmaster,
Saint Louis 3, Missouri.

My dear Sir:

In reply to your letter of October 22 (WAJ/p), you are informed that the publication submitted with your letter of October 12, entitled "Champion Workbook Exercises In English Grade V," "Champion Workbook Revised 1941 Arithmetic Exercises Grade V (Second Half)" and "Marjorie Kay's Book For Beginners (Pre-Primer)" are not acceptable for mailing at the book rate of 3 cents a pound in view of the fact that the pages comprising the publications, which are prepared with hektograph ink, are designed for removal and use in a duplicating process.

Very truly yours,

Third Assistant Postmaster General.

* * * * *

Excerpts from Exhibit No. 35

2913

JFT:p
107268

July 12, 1945.

Postmaster,
Saint Louis 3, Missouri.

My dear Sir:

It appears from information before this office that the following described parcel was accepted at your office for mailing at the reduced book rate of postage although it did not meet the requirements for acceptance at such rate:

*Sender—Webster Publishing Co., 1808 Washington Ave.,
St. Louis, Mo.*

Parcel stamped "books," postage 13 cents, mailed August 22, 1944, addressed to C. W. Park, Wichita, Kansas containing following publications:

My Arithmetic Tablet—6 books—Grades 3 to 8

(All 6 books had perforated pages, with notation to "crease before tearing".)

Please advise the circumstances under which this parcel was accepted for mailing at the book rate and whether it was examined at the time of mailing to determine the nature of the contents.

We have been denying the book rate to so-called work books having perforated pages regardless of whether the publications contained any instructions that pages are to be removed. Attention is also invited to Order No. 26165 appearing in the October 10, 1944, Postal Bulletin, amending paragraph 6, section 572, P. L. and R., defining the word "book" as "A book, within the contemplation of paragraph 5, shall be a volume *permanently* bound in cloth or paper having 24 or more pages, of which at least 22 are printed, and with the exception of text books containing incidental

spaces for students' notations, shall not contain ruled or blank pages intended for records or memoranda purposes.

This office will be pleased to be advised as to what steps were taken by you to determine whether mailings of books were properly acceptable at the reduced book rate.

Very truly yours,

Third Assistant Postmaster General.

2915

July 12, 1945.

Postmaster,

New York 1, New York.

My dear Sir:

It appears from information before this office that the following described parcel was accepted at your office for mailing at the reduced book rate of postage although it did not meet the requirements for acceptance at such rate:

Sender—Charles E. Merrill Company, Inc., 373 Fourth Avenue, New York, N. Y.

Parcel labeled "books," 7 cents postage, mailed April 4, 1945, addressed to Mrs. N. B. Humphrey, Wichita, Kansas, containing following publications:

Number Practice in Child Life—Grade 3

(perforated pages)

New Trend Arithmetic Work-Books—Grade 3

(not perforated)

New Trend Arithmetic Work-Books—Grade 4

(not perforated)

Please advise the circumstances under which this parcel was accepted for mailing at the book rate and whether it was examined at the time of mailing to determine the nature of the contents.

We have been denying the book rate to so-called work books having perforated pages regardless of whether the

publications contained any instructions that pages are to be removed. Attention is also invited to Order No. 26165 appearing in the October 10, 1944, Postal Bulletin, amending paragraph 6, section 572, P. L. and R., defining the word "book" as "A book, within the contemplation of paragraph 5, shall be a volume *permanently* bound in cloth or paper having 24 or more pages, of which at least 22 are printed, and with the exception of text books containing incidental spaces for students' notations, shall not contain ruled or blank pages intended for records or memoranda purposes.

This office will be pleased to be advised as to what steps were taken by you to determine whether mailings of books were properly acceptable at the reduced book rate.

Very truly yours,

Third Assistant Postmaster General.

2917

July 12, 1945.

Postmaster,
Cincinnati 2, Ohio.

My dear Sir:

It appears from information before this office that the following described parcels were accepted at your office for mailing at the reduced book rate of postage although they did not meet the requirements for acceptance at such rate:

Sender—American Book Co., 300 Pike St., Cincinnati, Ohio

Parcel stamped "books," 4 cents postage, mailed to Mrs. N. B. Humphrey, Wichita, Kansas, on April 6, 1945, containing the following publication:

Practice Activities in Senior English—Book 1
(perforated pages—no instructions as to removal)

Parcel stamped "books," 4 cents postage, mailed August 18, 1944, addressed to David D. Edwards, Parker Apartments, Madisonville, Kentucky, containing same publication listed above.

Please advise the circumstances under which these parcels were accepted for mailing at the book rate and whether they were examined at the time of mailing to determine the nature of the contents.

We have been denying the book rate to so-called work books having perforated pages regardless of whether the publications contained any instructions that pages are to be removed. Attention is also invited to Order No. 26165 appearing in the October 10, 1944, Postal Bulletin, amending paragraph 6, section 572, P. L. and R., defining the word "book" as "A book, within the contemplation of paragraph 5, shall be a volume *permanently* bound in cloth or paper having 24 or more pages, of which at least 22 are printed, and with the exception of text books containing incidental spaces for students' notations, shall not contain ruled or blank pages intended for records or memoranda purposes."

This office will be pleased to be advised as to what steps were taken by you to determine whether mailings of books were properly acceptable at the reduced book rate.

Very truly yours,

Third Assistant Postmaster General.

2919

July 10, 1945.

Postmaster,

Chicago 7, Illinois.

My dear Sir:

It appears from information before this office that the following described parcels were accepted at your office for mailing at the reduced book rate of postage although they did not meet the requirements for acceptance at such rate:

Sender—Benjamin H. Sanborn & Co., 221 E. 20th St., Chicago, Illinois

1. Parcel marked "books," 9 lbs., 28 cents postage, addressed to Evelyn DeMand, Wichita, Kansas, containing the following publications, mailed on or about June 5, 1945.

My Practice Book in Arithmetic—Book 1

"	"	"	"	"	2
"	"	"	"	"	3
"	"	"	"	"	4

(publications contained perforated pages but no instructions as to removal of pages)

2. Parcel labeled "books," 13 cents postage, addressed to Mrs. N. B. Humphrey, Shirkmere Apartments, Wichita, Kansas, containing copies of the same publications listed above, mailed on or about April 10, 1945.

Sender—The MacMillan Co., 2459 Prairie Avenue, Chicago, Illinois

3. Parcel labeled "books," mailed April 6, 1945, 7 cents postage, addressed to Mrs. N. B. Humphrey, Wichita, Kansas, containing the following publications:

English Through Experience—Book II

(Portion of each page perforated)

Practice Steps in English—Book Three

(Not perforated)

2920 *Sender—Lyons & Carnahan, 2500 Prairie Avenue, Chicago, Illinois*

4. Parcel marked "books," 7 cents postage, addressed to Mrs. N. B. Humphrey, Wichita, Kansas, mailed April 4, 1945, containing following publications:

Number Practice in Child Life—Grade 1

(perforated pages—no instructions as to removal or space for name)

Number Practice in Child Life—Grade 3

(perforated pages—no instructions as to removal or space for name)

Sender—Ginn and Company, 2301 Prairie Avenue, Chicago, Illinois

5. Parcel stamped "books," 7 cents postage, mailed April 3, 1945, addressed to Mrs. N. B. Humphrey, Wichita, Kansas, containing following publications:

Jolly Numbers Primer—New Edition

(perforated pages—no instructions as to removal or space for name)

Jolly Numbers—Book One

(perforated pages—no instructions as to removal)

Jolly Numbers—Book Two

(perforated pages—refers to a manual)

6. Parcel stamped "books," 7 cents postage, mailed August 24, 1944, addressed to Evelyn DeMand, Wichita, Kansas, containing same publications described in number 5.

Sender—Laidlow Brothers, 328 So. Jefferson Street, Chicago, Illinois

7. Parcel stamped "books," 4 cents postage, mailed August 22, 1944, addressed to C. W. Park, Wichita, Kansas, containing the following publication:

Essentials of Everyday English—Grade 8

(perforated pages—space for student's name)

8. Parcel stamped "books," 7 cents postage, C.O.D., total 31 cents, mailed August 21, 1944, addressed to Evelyn 2921 DeMand, Wichita, Kansas, containing following publications:

The Lennes Essentials of Arithmetic—Grade Three

(Perforated pages—statement as to "pupils may exchange papers")

The Lennes Essentials of Arithmetic—Grade Four

(perforated pages—instructions say pages may be detached).

Please advise the circumstances under which these parcels were accepted for mailing at the book rate and whether they were examined at the time of mailing to determine the nature of the contents.

Attention in this respect is invited to the letter sent you under date of August 24, 1944, in which it was pointed out that we have been denying the book rate to so-called work books having perforated pages either with or without headings with blank space for the insertion of the student's name on the various pages constituting lesson examinations, regardless of whether the publications contained any instructions that pages are to be removed, and to your reply under date of September 2, 1944, to the effect that such publications will not be accepted at the book rate; also to Order No. 26165 appearing in the October 10, 1944, Postal Bulletin, amending paragraph 6, section 572, P. L. and R., defining the word "book" as "A book, within the contemplation of paragraph 5, shall be a volume *permanently* bound in cloth or paper having 24 or more pages, of which at least 22 are printed, and with the exception of text books containing incidental spaces for students' notations, shall not contain ruled or blank pages intended for records or memoranda purposes." This office would be pleased to be advised what steps were taken at that time to determine whether mailings of books were properly acceptable at the reduced book rate.

Very truly yours,

Third Assistant Postmaster General.

